

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

VOL. 31

MAY 14, 1997

NO. 20

This issue contains:

U.S. Customs Service

T.D. 97-32 Through 97-34

General Notices

Proposed Rulemaking

U.S. Court of International Trade

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Classification: C97/52

Valuation: V97/3 Through V97/7

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 97-32)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license without prejudice.

<i>Port</i>	<i>Individual</i>	<i>License #</i>
Detroit	Donald M. Stern	3217

Dated: April 25, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, May 5, 1997 (62 FR 24549)]

(T.D. 97-33)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that on October 28, 1996, the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license without prejudice.

<i>Port</i>	<i>Individual</i>	<i>License #</i>
San Diego	Eric Swadell, CHB	07995

Dated: April 29, 1997.

PHILIP METZGER,
Director,
Trade Compliance Division.

[Published in the Federal Register, May 5, 1997 (62 FR 24550)]

(T.D. 97-34)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license with prejudice.

<i>Port</i>	<i>Individual</i>	<i>License #</i>
San Francisco	David E. Mangus	10721
San Francisco	Priority Customs Service	13121

Dated: April 29, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, May 5, 1997 (62 FR 24549)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 3-1997)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of March 1997 follow. The last notice was published in the CUSTOMS BULLETIN on April 16, 1997.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482-6960.

Dated: May 1, 1997.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

04/01/97
13:09:01

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MARCH 1997

REC NUMBER	EXP DT	EFF DT	NAME OF COP, TMK, TMM OR MSK	OWNER NAME	REC
COP9700030	19970314	20160611	KING COBRA	COBRA GOLF INCORPORATED	N
COP9700031	19970321	20170321	DANGERINA DOLL	MATTEL INC.	N
COP9700032	19970321	20170321	EMMASTHARDIN	MATTEL INC.	N
COP9700033	19970321	20170321	BARBIE PRINCE IN PLAY CD-ROM	MATTEL INC.	N
COP9700034	19970321	20170321	BARBIE FASHION DESIGNER CD-ROM	MATTEL INC.	N
COP9700035	19970321	20170321	GYMNASI STACIE DOLL BODY	MATTEL INC.	N
COP9700036	19970321	20170321	BARBIE DOLL (TEEN AGE FASHION MODEL)	MATTEL INC.	N
COP9700037	19970321	20170321	ROSEBUD BOY DOLL	MATTEL INC.	N
COP9700038	19970321	20170321	GYMNASI STACIE DOLL HEAD	MATTEL INC.	N
COP9700039	19970321	20170321	GYMNASI STACIE DOLL HEAD	MATTEL INC.	N
COP9700040	19970326	20170326	KINGSFORD'S BREW HOUSE	DEPARTMENT 56, INC.	N
COP9700041	19970326	20170326	UPTOWN SHOPPES, SET OF 3 (HABERDASHERY, CITY CLOCK	DEPARTMENT 56, INC.	N
COP9700042	19970326	20170326	SANTA'S LOCKOUT TOWER	DEPARTMENT 56, INC.	N
COP9700043	19970326	20170326	ELFIE'S SLED & SKATES	DEPARTMENT 56, INC.	N
SUBTOTAL RECORDATION TYPE			14		
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TMK97000146	19970321	20030423	MARCA PINA	PINAKAMASARAP CORPORATION	N
TMK97000147	19970321	20030423	MARK CROSS AND LION DESIGN	SARA LEE CORPORATION	N
TMK97000148	19970321	20040508	LION DESIGN	SARA LEE CORPORATION	N
TMK97000149	19970321	20040508	MARK CROSS	SARA LEE CORPORATION	N
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TMK97000152	19970321	20040508	MARK CROSS	SARA LEE CORPORATION	N
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TMK97000154	19970321	20040508	TRUE ACE	HIREKO TRADING COMPANY INC.	N
TMK97000155	19970321	20050919	TOUR GEAR	HIREKO TRADING COMPANY INC.	N
TMK97000156	19970321	20050926	SYNCHRON	HIREKO TRADING COMPANY INC.	N
TMK97000157	19970321	20050926	SYNCHRONATCH	HIREKO TRADING COMPANY INC.	N
TMK97000158	19970321	20050926	SYNCHRONATCH	HIREKO TRADING COMPANY INC.	N
TMK97000159	19970321	20050926	PRO SUMMIT	HIREKO TRADING COMPANY INC.	N
TMK97000160	19970321	20050926	POWERPACT	HIREKO TRADING COMPANY INC.	N
TMK97000161	19970321	20050926	MEGA FORCE	HIREKO TRADING COMPANY INC.	N
TMK97000162	19970321	19991128	ACER	FANTASY, INC.	N
TMK97000163	19970321	20060217	PABLO AND DESIGN	FORD MOTOR COMPANY	N
TMK97000164	19970321	20060217	CRISCO	FORD MOTOR COMPANY	N
TMK97000165	19970321	20060217	COMET	FORD MOTOR COMPANY	N
TMK97000166	19970321	20060217	COMET	FORD MOTOR COMPANY	N
TMK97000167	19970325	20050910	CONTINENTAL STAR DESIGN	SPRAGUE COMPANY	N
TMK97000168	19970325	20050910	SAM & LIBBY	UMPRO TRADEMARK INC.	N
TMK97000169	19970325	20050910	JUST LIBBY	UMPRO TRADEMARK INC.	N
TMK97000170	19970325	20050910	DOUBLE DIAMOND DESIGN	UMPRO TRADEMARK INC.	N
TMK97000171	19970325	19980509	DOUBLE DIAMOND DESIGN	UMPRO TRADEMARK INC.	N

U.S. CUSTOMS SERVICE

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PAGE
DETAIL

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MARCH 1997

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REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, THM OR MSK	OWNER NAME	SEC
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TKM9700174	19970325	20000807	UMBR0 & DOUBLE DIAMOND DESIGN	UMBR0 TRADEMARK INC.	N
TKM9700175	19970325	20000410	SAND SOCCER	UMBR0 TRADEMARK INC.	N
TKM9700176	19970325	20010730	SAND SOCCER	UMBR0 TRADEMARK INC.	N
TKM9700177	19970325	20020721	SAND SOCCER	UMBR0 TRADEMARK INC.	N
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TKM9700180	19970325	20020721	SAND SOCCER	UMBR0 TRADEMARK INC.	N
TKM9700181	19970325	20050910	COUGAR DESIGN	FORD MOTOR COMPANY	N
TKM9700182	19970327	20061119	P-SHAPED CONFIGURATION OF A PULL EARS FOR AN ELECTRICAL	R. A. PHILLIPS, INC.	N
TKM9700183	19970327	20050725	FOMOCO STYLIZED	FORD MOTOR COMPANY	N
TKM9700184	19970327	20060827	FORD STYLIZED IN OVAL DESIGN	FORD MOTOR COMPANY	N
TKM9700185	19970327	20060116	FORD V8 DESIGN	FORD MOTOR COMPANY	N
TKM9700186	19970327	20050926	MUSTANG RUNNING HORSE DESIGN	FORD MOTOR COMPANY	N
TKM9700187	19970327	20050912	MUSTANG RUNNING HORSE DESIGN	FORD MOTOR COMPANY	N
TKM9700188	19970327	20060521	MUSTANG RUNNING HORSE DESIGN	FORD MOTOR COMPANY	N
TKM9700189	19970327	20060611	PROBE	FORD MOTOR COMPANY	N
TKM9700190	19970327	20051219	TAURUS	FORD MOTOR COMPANY	N
TKM9700191	19970327	20050706	THUNDERBIRD	FORD MOTOR COMPANY	N
TKM9700192	19970327	20050706	THUNDERBIRD	FORD MOTOR COMPANY	N
TKM9700193	19970328	20060416	THUNDERBIRD	FORD MOTOR COMPANY	N
TKM9700194	19970328	20050509	THUNDERBIRD	FORD MOTOR COMPANY	N
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TKM9700196	19970328	20051226	MODEL T	FORD MOTOR COMPANY	N
TKM9700197	19970328	20050926	MUSTANG	FORD MOTOR COMPANY	N
TKM9700198	19970328	20050926	MUSTANG	FORD MOTOR COMPANY	N
TKM9700199	19970328	20050912	MUSTANG	FORD MOTOR COMPANY	N
TKM9700200	19970328	20051219	MUSTANG HORSE WITH BARS DESIGN	FORD MOTOR COMPANY	N
TKM9700201	19970328	20050912	MUSTANG HORSE WITH BARS DESIGN	FORD MOTOR COMPANY	N
TKM9700202	19970328	20050912	MUSTANG HORSE WITH BARS DESIGN	FORD MOTOR COMPANY	N
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TKM9700208	19970328	20060507	FORD	FORD MOTOR COMPANY	N
TKM9700209	19970328	20041025	FORD	FORD MOTOR COMPANY	N
TKM9700210	19970328	20041025	MACH II	FORD MOTOR COMPANY	N
TKM9700211	19970328	20060407	MACH II	FORD MOTOR COMPANY	N
TKM9700212	19970328	20051219	MERCURY	FORD MOTOR COMPANY	N
TKM9700213	19970328	20050704	OFFICIAL LICENSED PRODUCT LOGO	FORD MOTOR COMPANY	N
TKM9700214	19970328	20050822	OFFICIAL LICENSED PRODUCT LOGO	FORD MOTOR COMPANY	N
TKM9700215	19970328	20050711	OFFICIAL LICENSED PRODUCT LOGO	FORD MOTOR COMPANY	N
TKM9700216	19970328	20050919	OFFICIAL LICENSED PRODUCT LOGO	FORD MOTOR COMPANY	N
TKM9700217	19970328	20050718	OFFICIAL LICENSED PRODUCT LOGO	FORD MOTOR COMPANY	N

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SUBTOTAL RECORDATION TYPE

04/01/97 13:09:01	U.S. CUSTOMS SERVICE IPR RECORDATIONS ADDED IN MARCH 1997	PAGE DETAIL	1
REC NUMBER	NAME OF COP, TMK, TIM OR MSK	OWNER NAME	RES
EFF DT			
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TOTAL RECORDATIONS ADDED THIS MONTH			
92			

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 29, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF RULING LETTER RELATING TO
TARIFF CLASSIFICATION OF CORSELETS

AGENCY: U.S. Customs Service. Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a corselet, specifically, style 9504. Style 9504, is a corset made of 82 percent nylon and 18 percent spandex lace like fabric. The garment features 50 percent polyester and 50 percent nylon cups and a two-ply panel of the lace-like fabric at the front. In addition, it has adjustable shoulder straps, elasticized leg openings and a bra-type hook and eye adjustable closure at the cotton lined crotch. The highly elasticized garment is designed to provide body support.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 14, 1997.

FOR FURTHER INFORMATION CONTACT: DeAnn Schaffer, Textiles Branch, Tariff Classification Appeals Division (202) 482-7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 19, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 12, a notice of a proposal to revoke NY 817641, dated January 11, 1996, which classified a corselet, style 9504, under sub-

heading 6212.30.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for corsets, of man-made fiber.

It is now Customs position that the corselet, style 9504, is properly classified under subheading 6212.90.0030, HTSUSA, as other body supporting garments, of man-made fibers of man-made fibers of rubber or plastics.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 817641, dated January 11, 1996, to reflect the classification of the merchandise under subheading 6212.90.0030, HTSUSA. HQ Ruling Letter (HQ) 959776, revoking NY 817641, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations.

Dated: April 29, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington DC, April 29, 1997.
CLA-2 RR-TC:TE 959776 DHS
Category: Classification
Tariff No. 6212.90.0030

MR. STEVE LIPTAK
INTER-MARINE FORWARDING COMPANY INC.
156 William Street
New York, NY 10038-2689

Re: Classification of a corselet; Revocation of NY 817641.

DEAR MR. LIPTAK:

This is in reference to a ruling issued to you by our Area Director, New York Seaport, NY 817641, dated January 11, 1996, concerning the classification of women's body supporting garments. That ruling was issued in response to your letter of December 24, 1995, submitted on behalf of Bestform Foundations. We have reconsidered this ruling in light of the holding in Headquarters Ruling Letter (HQ) 959353, dated October 28, 1996, and HQ 959282, dated October 28, 1996, and determined that the corselet was improperly classified.

NY 817641 is revoked in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C.

1625(c)(1)), as amended by section 623 of Title VI Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), notice of the proposed revocation of NY 817641 was published on March 19, 1997, in the CUSTOMS BULLETIN, in Volume 31, No. 12. This ruling sets forth the classification of the corselet.

Facts:

Style 9504, is a corselet made of 82% nylon and 18% spandex lace-like knit fabric. The garment features 50% polyester and 50% nylon cups and a two-ply panel of the lace-like fabric at the front. In addition, it has adjustable shoulder straps, elasticized leg openings and a bra-type hook and eye adjustable closure at the cotton lined crotch. The highly elasticizes garment is designed to provide body support. In NY 817641, this garment was classified in subheading 6212.30.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for brassieres, girdles, corsets, * * *, and similar articles and parts thereof, * * *: corsets, of man-made fiber.

Issue:

What is the proper classification of the merchandise at issue?

Law and Analysis.

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order.

Heading 6212, HTSUS, provides for, brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted. Within this heading are four subheadings which provide for the following types of garments: brassieres at subheading 6212.10, HTSUS; girdles and panty girdles at subheading 6212.20, HTSUS; corsets at subheading 6212.30, HTSUS; and other body supporting garments at subheading 6212.90, HTSUS. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 6212, HTSUS, state in pertinent part:

This heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof. These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

The heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselets (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset-belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or hooks.

All of the above articles may be furnished with trimmings of various kinds (ribbons, lace, etc.), may incorporate fittings and accessories or non-textile materials (e.g., metal, rubber, plastic or leather).

In HQ 959282 and HQ 959353, this office held that body briefers or corselets are classifiable under subheading 6212.90.0030, HTSUSA, as other body supporting garments. The discussion leading to this holding is provided below.

Body Briefers

In order to better comprehend the nature of each of the subject types of garments, a review of the lexicographic sources is necessary. In the case of the Body Briefers the following definitions are useful.

"Corset" is defined as:

Women's one piece sleeveless, laced garment or shaping the figure. Generally, a heavily boned, rigid garment worn from 1820s to 1930s. Since 1940s made of lighter-weight elasticized fabrics and called a GIRDLE or FOUNDATION GARMENT. *Fairchild's Dictionary of Fashion*, 2d Edition.

Smoothly fitted undergarment extending from or below the bust down over the hip-line; often stiffened by strips or steel or whalebone, limbered by elastic goring, some-

times tightened by lacing. Worn by women for support and figure molding. Originally, made in two pieces laced together at front and back. Formally called stays; now usually called corsets. *Fashion Dictionary*, by Mary Brooks Picken, (1973), at 89.

A close-fitting, reinforced undergarment, reaching from the bust to below the hips, worn by women to support the body or mold the figure. *The Modern Textile and Apparel Dictionary, 4th Edition*, by George E. Linton, (1973), at 126.

"Corselets" is defined as:

Under-garment combining girdle or lightly-boned corset and brassiere. Also called foundation or one-piece corset. *The Fashion Dictionary*, by Mary Brooks Picken, (1973), at 89.

Foundation with firm support achieved by boning, power-net side panels, and front panel of non-stretch nylon taffeta. Sometimes has an inner belt which hooks separately to help flatten abdomen. Bra top is often of nylon lace with marquisette lining with adjustable shoulder straps. Foundation is fastened by hooks underneath zipper and has 6 garters. *Essential Terms of Fashion*, by Charlotte Mankey Calasibetta, (1986), at 64.

A one-piece garment combining brassiere and girdle, was developed in the 1930s as is still worn. *20,000 Years of Fashion*, by Francois Boucher, (1983).

HQ 959282 and HQ 959353 point out that the EN to heading 6212, HTSUS, provides for corsets and corselets as distinctly different garments since it refers to each garment individually. Additionally, the EN to heading 6212, HTSUS, states that corsets are usually reinforced with flexible metallic, whalebone, or plastic stays and are generally fastened by lacing or hooks. The corselets, at issue, like the body briefers, in HQ 959353 and HQ 959282, do not share the features of corsets as set forth in the EN to heading 6212, HTSUS. They do not feature lacing or hooks attached for fastening nor are they reinforced with any of the kinds of stays mentioned in the EN to heading 6212, HTSUS. Additionally, the garments perform the function of brassiere and girdle and thus do not fit in any of the *eo nomine* subheading provisions for heading 6212, HTSUS.

This office, in HQ 959282 and HQ 959353, also acknowledged the discrepancy between the tariff at heading 6212, HTSUS, and the EN for heading 6212, HTSUS, at the subheading level (6212.30). The tariff provides for corsets in subheading 6212.30, HTSUS, and the EN to heading 6212, HTSUS, provides for corselets at the same subheading level (6212.30). The ENs serve only as guidance in the classification of garments and as such, are not binding. The tariff on the other hand, is statutory and binding on the U.S. Customs Service. Therefore, the proper classification for these garments is at the "other" level, that is in subheading 6212.90, HTSUS.

The corselets style no. 9504, was improperly classified in subheading 6212.30, HTSUS (corsets), and is properly classified in subheading 6212.90, HTSUS, as other body supporting garments.

Holding:

Style number 9504, a corselet is classified in subheading 6212.90.0030, HTSUSA, which provides for, inter alia, "Brassieres, girdles, corsets, * * *, and similar articles and parts thereof, whether or not knitted or crocheted: Other, Of man-made fibers or man-made fibers and rubber or plastics." The applicable rate of duty is 6.9 percent *ad valorem* and the quota category is 659. NY 817641, dated January 11, 1996, is revoked.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

REVOCATION OF RULING LETTER RELATING TO THE
TARIFF CLASSIFICATION OF A "SLING PAD"

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NY) 818550, dated February 8, 1996, concerning the tariff classification of a sling pad. Notice of the proposed revocation was published on March 19, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 12.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 14, 1997.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway,
Tariff Classification Appeals Division (202) 482-6996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 19, 1997, Customs published in the CUSTOMS BULLETIN Volume 31, No. 12, a notice of a proposal to revoke NY 818550, dated February 8, 1996, which classified a sling pad used as an insert inside a baby's training pants as "other made up textile articles" under subheading 6307.90.9989 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). It is now Customs position that the garment is classifiable as babies' cotton diapers under subheading 6209.20.5040, HTSUSA.

No comments were received in response to the notice.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs revokes NY 818550, dated February 8, 1996. Headquarters Ruling Letter 959829 revoking NY 818550 is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 29, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 29, 1997.

CLA-2 RR:TC:TE 959829 RH
Category: Classification
Tariff No. 6209.20.5040

MR. ALLAN GORDON
PERFORMANCE TRADING INC.
520 So. Lafayette Park Place
Suite 200
Los Angeles, CA 90057

Re: Classification of a Sling Pad; NY 818550; Heading 6307; Heading 6209.

DEAR MR. GORDON:

On February 8, 1996, Customs issued New York Ruling Letter (NY) 818550 to your company in response to a request that you made concerning the classification of a "sling pad" used as an insert inside babies' training pants. In NY 818550, Customs classified the sling pad as "other made up textile articles" under subheading 6307.90.9989 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

We enclose a copy of the ruling for your convenience.

Our New York office asked us to review the ruling and change the tariff classification of the sling pad to subheading 6209.20.5040, HTSUSA, which provides, in part, for babies' woven cotton diapers.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), notice of the proposed revocation of NY 818550 was published on March 19, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 12.

Facts:

The merchandise under consideration is a removable sling pad which is used as an insert inside babies' training pants to absorb urine and fecal matter. It is made of 100 percent cotton twill weave fabric and measures 10 5/8 by 3 3/4 inches.

Issue:

Is the sling pad classifiable under heading 6307, HTSUSA, as "other made up textile articles" or under heading 6209, HTSUSA, as babies' cotton diapers?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The EN to the Harmonized Commodity Description and Coding System (Harmonized System) constitute the official interpretation of the scope and content of the nomenclature at the international level. They represent the considered views of classification experts of the Harmonized System Committee. While not treated as dispositive, the EN are to be given considerable weight in Customs interpretation of the HTSUSA. It has, therefore, been the practice of the Customs Service to consult the terms of the EN when interpreting the HTSUSA.

The EN to heading 6209 state, in part, that:

In accordance with Chapter Note 4(a) the expression in "babies' garments and clothing accessories" applies to articles for young children of a body height not exceeding 86 cm. It also covers babies' napkins (diapers).

In accordance with the EN, babies' napkins are treated the same as babies' diapers for classification purposes. In this case, the sling pad, like a diaper and napkin, absorbs urine and fecal matter. We agree with our New York office that the terms of heading 6209 depict the sling pad more accurately and specifically than the terms of heading 6307. Thus, in accordance with GRI 1, the sling pad is classifiable under heading 6209.

Holding:

The sling pad is classifiable under subheading 6209.20.5040, HTSUSA, which provides, in part, for babies' cotton diapers. The applicable duty rate is 9.7 percent *ad valorem* and the textile category number is 239.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CORSELETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of corselets, specifically, styles 7008 and 7155. Style 7008, is a corselet made of 78% nylon and 22% spandex knit fabric. The garment features fiberfill cups and a two-ply control panel at the front. In addition, it has adjustable shoulder straps, elasticized leg openings and a bra-type hook and eye adjustable closure at the crotch. The highly elasticized red garment is designed to provide body support. Style 7155, is a corselet made of 79% nylon and 21% spandex knit fabric. The garment features embroidered cups and a two-ply control panel at the front. In addition, it has adjustable shoulder straps, elasticized leg openings and a bra-type hook and eye adjustable closure at the cotton lined crotch. This highly elasticized garment is also designed to provide body support.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 14, 1997.

FOR FURTHER INFORMATION CONTACT: Dean Schaffer, Textiles Branch, Tariff Classification Appeals Division 202) 482-7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 19, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 12, a notice of a proposal to modify NY 817700, dated January 11, 1996, which classified corselets, styles 7008 and 7155, under subheading 6212.30.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for corsets, of man-made fiber.

It is now Customs position that the corselets, styles 7008 and 7155, are properly classified under subheading 6212.90.0030, HTSUSA, as other body supporting garments, of man-made fibers or man-made fibers of rubber or plastics.

The modification of NY 817700, does not pertain to styles 6346 and 5050, brassiers, also classified in NY 817700.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation, Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY 817700, dated January 11, 1996, to reflect the classification of the merchandise under subheading 6212.90.0030, HTSUSA. HQ Ruling Letter (HQ) 959775, modifying NY 817700, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 29, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, April 29, 1997.

CLA-2 RR:TC:TE 959775 DHS

Category: Classification

Tariff No. 6212.90.0030

Ms. MARY B. APPLGATE

NCC INDUSTRIES, INC.

P.O. Box 5428

Cortland, NY 13045

Re: Classification of brassieres and corselets from the Dominican Republic; Modification of NY 817700.

DEAR Ms. APPLGATE:

This is in reference to a ruling issued to you by our Area Director, New York Seaport, NY 817700, dated January 11, 1996, concerning the classification of brassieres and corselets. That ruling was issued in response to your letter of December 16, 1995. We have reconsidered this ruling in light of the holdings in HQ 959353, dated October 28, 1996, and HQ 959282, dated October 28, 1996, and determined that the corselets (styles 7008 and 7155) were improperly classified. The classification of the brassieres (styles 6346 and 5050) are proper and therefore, are not subject to this reconsideration.

NY 817700 is modified in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), notice of the proposed modification of NY 817700 was published on March 19, 1997, in the CUSTOMS BULLETIN, in Volume 31, No. 12. This ruling sets forth the classification of the corselet.

Facts:

Style 7008 (630-241) is a corselet made of 78% nylon and 22% spandex knit fabric. The garment features fiberfill cups and a two-ply control panel at the front. In addition, it has adjustable shoulder straps, elasticized leg openings and a bra-type hook and eye adjustable closure at the crotch. The highly elasticized garment is designed to provide body support. In NY 817700, this garment was classified in subheading 6212.30.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for brassieres, girdles, corsets, * * *, and similar articles and parts thereof, * * *: corsets, of man-made fiber."

Style 7155 (630-242) is a corselet made of 79% nylon and 21% spandex knit fabric. The garment features embroidered cups and a two-ply control panel at the front. In addition, it has adjustable shoulder straps, elasticized leg openings and a bra-type hook and eye adjustable closure at the cotton lined crotch. The highly elasticized garment is designed to provide body support. In NY 817700, this garment was, also, classified in subheading 6212.30.0020, HTSUSA.

Issue:

What is the proper classification of the merchandise at issue?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order.

Heading 6212, HTSUS, provides for, brassieres, girdles, corsets, braces, suspenders, garments and similar articles and parts thereof, whether or not knitted or crocheted. Within this heading are four subheadings which provide for the following types of garments: brassieres at subheading 6212.10, HTSUS; girdles and panty girdles at subheading 6212.20, HTSUS; corsets at subheading 6212.30, HTSUS; and other body supporting garments at subheading 6212.90, HTSUS. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 6212, HTSUS, state in pertinent part:

This heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof. These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

The heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselets (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset-belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or hooks.

All the above articles may be furnished with trimmings of various kinds of (ribbons, lace, etc.), may incorporate fittings and accessories or non-textile materials (e.g., metal, rubber, plastic or leather).

In HQ 959282 and HQ 959353, this office held that body briefers or corselets are classifiable under subheading 6212.90.0030, HTSUS, as other body supporting garments. The discussion leading to this holding is provided below.

Body Briefers

In order to better comprehend the nature of each of the subject types of garments, a review of the lexicographic sources is necessary. In the case of the Body Briefers the following definitions are useful.

"Corset" is defined as:

Women's one piece sleeveless, laced garment for shaping the figure. Generally, a heavily boned rigid garment worn from 1820s to 1930s. Since 1940s made of lighter-weight elasticized fabrics and called a GIRDLE or FOUNDATION GARMENT. *Fairchild's Dictionary of Fashion*, 2d Edition.

Smoothly fitted undergarment extending from or below the bust down over the hip-line; often stiffened by strips or steel or whalebone, limbered by elastic goring, sometimes tightened by lacing. Worn by women for support and figure-molding. Originally, made in two pieces laced together at front and back. Formally called stays; now usually called corsets. *Fashion Dictionary*, by Mary Brooks Picken, (1973), at 89.

A close-fitting, reinforced undergarment, reaching from the bust to below the hips, worn by women to support the body or mold the figure. *The Modern Textile and Apparel Dictionary*, 4th Edition, by George E. Linton, (1973), at 126.

"Corselet" is defined as:

Under-garment combining girdle or lightly-boned corset and brassiere. Also called foundation or one-piece corset. *The Fashion Dictionary*, by Mary Brooks Picken, (1973), at 89.

Foundation with firm support achieved by boning, power-net side panels, and front panel of non-stretch nylon taffeta. Sometimes has an inner belt which hooks separately to help flatten abdomen. Bra top is often of nylon lace with marquisette lining with adjustable shoulder straps. Foundation is fastened by hooks underneath zipper and has 6 garters. *Essential Terms of Fashion*, by Charlotte Mankey Calasibetta, (1986), at 64.

A one-piece garment combining brassiere and girdle, was developed in the 1930s as is still worn. *20,000 Years of Fashion*, by Francois Boucher, (1983).

HQ 959282 and HQ 959353 point out that the EN to heading 6212, HTSUS, provides for corsets and corselets as distinctly different garments since it refers to each garment individually. Additionally, the EN to heading 6212, HTSUS, states that corsets are usually reinforced with flexible metallic, whalebone, or plastic stays and are generally fastened by lacing or hooks. The corselets, at issue, like the body briefers, in HQ 959353 and HQ 959282, do not share the features of corsets as set forth in the EN to heading 6212, HTSUS. They do not feature lacing or hooks attached for fastening nor are they reinforced with any of the kinds of stays mentioned in the EN to heading 6212, HTSUS. Additionally, the garments perform the function of brassiere and girdle and thus do not fit in any of the *ex nomenclature* subheading provisions for heading 6212, HTSUS.

This office, in HQ 959282 and HQ 959353, also acknowledged the discrepancy between the tariff at heading 6212, HTSUS, and the EN for heading 6212, HTSUS, at the subheading level (6212.30). The tariff provides for corsets in subheading 6212.30, HTSUS, and the

EN to heading 6212, HTSUS, provides for corselets at the same subheading level (6212.30). The ENs serve only as guidance in the classification of garments and as such, are not binding. The tariff on the other hand, is statutory and binding. Therefore, the proper classification for these garments is at the "other" level, that is in subheading 6212.90, HTSUS.

The corselets, style 7008 and style 7155 were improperly classified in subheading 6212.30, HTSUS (corsets), and are properly classified in subheading 6212.90, HTSUS, as other body supporting garments.

Holding:

The corselets, style 7008 and style 7155, are classified in subheading 6212.90.0030, HTSUSA, which provides for, inter alia, "Brassieres, girdles, corsets, * * *, and similar articles and parts thereof, whether or not knitted or crocheted: Other, Of man-made fibers or man-made fibers and rubber or plastics." The applicable rate of duty is 6.9 percent *ad valorem* and the quota category is 659. NY 817700, dated January 11, 1996, is modified to reflect this classification.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF RULING LETTERS
RELATING TO TARIFF CLASSIFICATION OF FRUIT PUREES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of two tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of fruit purees. The fruit purees are homogenized preparations made with fruit that is washed, boiled, passed through three screens of decreasing size aperture, concentrated, sterilized, refrigerated, and aseptically packed in 55 gallon drums.

DATE: Comments must be received on or before June 13, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482-7061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letters (NYRLs) 808553 and 896391 to reflect the proper classification of the given fruit purees in heading 2007, HTSUSA, the provision for other jams, fruit jellies, marmalades, fruit or nut purees and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter. Classification is fact specific.

In NYRLs 808553 and 896391, Customs classified pear and apricot purees in heading 2008, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included, dutiable at 17.6 and 12.5 percent *ad valorem*, respectively. Articles classifiable under subheading 2008.50.2000, HTSUS are eligible for duty free treatment, as products of Argentina. NYRLs 808553 and 896391 are set forth as "Attachment A" and "Attachment B" to this document.

We now believe that NYRLs 808553 and 896391 are incorrect. The fruit purees are classifiable in heading 2007, HTSUSA, the provision for other jams, fruit jellies, marmalades, fruit or nut purees and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter. The applicable rate of duty is free.

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 959822 revoking NYRL 808553 is set forth in "Attachment C" to this document. Proposed HRL 960370 revoking NYRL 896391 is set forth in "Attachment D" to this document.

Claims for detrimental reliance under 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date publication of this notice.

Dated: April 23, 1997.

JOHN ELKINS,
(for John Durant, Director.
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,
New York, NY, April 21, 1995.

CLA-2-20:S:N:N7:228 808553

Category: Classification

Tariff No. 2008.40.0040

RENE ORTIZ VILLAFANE
RENE ORTIZ VILLAFANE, INC.
2000 Kennedy Ave Suite 207
MAI Basic Four Center
San Juan, PR 00920

Re: The tariff classification of pear pulp from Argentina.

DEAR MR. VILLAFANE:

In your letter dated March 22, 1995 you requested a tariff classification ruling on behalf of Empresas La Famosa, Inc., Toa Baja, Puerto Rico.

The sample submitted with your letter was examined and disposed of. The product, pear pulp, is a yellowish brown, homogenized preparation containing no identifiable fruit pieces. It is the result of a several step process. The pears are washed, boiled, finished by passing through three screens of decreasing size aperture, concentrated, sterilized, refrigerated, and aseptically packed in 55 gallon drums.

The applicable subheading for the pear pulp will be 2008.40.0040, Harmonized Tariff Schedule of the United States (HTS), which provides for fruit * * * otherwise prepared or preserved * * * pears * * * other. The rate of duty will be 17.6 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE

Area Director
New York Seaport

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,
New York, NY, April 13, 1994.

CLA-2-20:S:N:N7:228 896391

Category: Classification

Tariff No. 2008.50.2000

MS. ALICIA B. GORDON
PURCELL & ASSOCIATES
3170 Crow Canyon Place Suite 220
San Ramon, CA 94583

Re: The tariff classification of an apricot product from Argentina.

DEAR MS. GORDON:

In your letter dated March 28, 1994, you requested a tariff classification ruling.

A sample, submitted with your letter, was opened, examined and disposed of. The product is described as apricot paste. Examination of the sample found the product to be a soft, creamy, orange-colored material, containing no fruit pieces. It is prepared by removing the pits from the fruit, pressing this material through screens to produce a smooth-textured product, concentrating by heat, and packing through "an aseptic drumming line" into

55-gallon drums. After importation, the apricot product will be used in the manufacture of beverages.

The applicable subheading for this product will be 2008.50.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for fruit * * * otherwise prepared or preserved * * * apricots * * * pulp. The duty rate will be 12.5 percent *ad valorem*.

Articles classifiable under subheading 2008.50.2000, HTS, which are products of Argentina are entitled to duty free treatment under the Generalized Systems of Preferences (GSP) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,

*Area Director,
New York Seaport.*

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:FC 959822 RC

Category: Classification
Tariff No. 2007.99.4800

RENE ORTIZ VILLAFANE
RENE ORTIZ VILLAFANE, INC.
2000 Kennedy Avenue, Suite 207
MAI Basic Four Center
San Juan, PR 00920

Re: Revocation of New York Ruling Letter (NYRL) 808553; pear puree.

We have been asked to reconsider NYRL 808553, dated April 21, 1995. This ruling, issued to you, on behalf of your company, concerns the classification of pear puree, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Facts:

In NYRL 808553, dated April 21, 1995, Customs classified a pear puree product in subheading 2008.40.0040, HTSUSA, dutiable in 1995 at 17.6 percent *ad valorem*. The homogenized pear product contains no identifiable fruit pieces. The product has been prepared: washed, crushed, sieved (using three sieves of differing apertures), sterilized, refrigerated, and aseptically packed in 55-gallon drums.

Issue:

Whether the instant pear product is classifiable in subheading 2008.40.0040, HTSUSA, or in subheading 2007.99.4800, HTSUSA.

Law and Analysis:

The General Rules of Interpretation (GRIs) taken in their appropriate order provide a framework for classification of merchandise under the HTSUS. Most imported goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

The EN for heading 2008 (p. 152) refers to fruit "prepared or preserved otherwise than by any of the processes specified in * * * the preceding headings of this chapter." The ar-

ticles in question are pear purees. According to *Webster's New World Dictionary of the American Language, Second College Edition*, (The World Publishing Company 1972), the term "puree" denotes a thick, moist, smooth-textured form of cooked vegetables, fruits, etc., usually made by pressing the pulp through a sieve or by whipping it in a blender. The instant product is pulp that has been pressed through three sieves. As such, the pulp has in fact been "pureed." The word "puree" appears specifically in the heading 2007, HTSUS, the heading immediately preceding 2008, HTSUS. Therefore, it is our opinion the puree is properly classified in heading 2007 HTSUS, rather than heading 2008, HTSUS.

Holding:

The pear puree is properly classifiable in subheading 2007.99.4800, HTSUSA, the provision for "Jams, fruit jellies, marmalades, fruit or nut puree and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter: Other: Other: Pastes and purees: Apple, quince and pear." The applicable rate of duty is free.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:FC 960370 RC
Category: Classification
Tariff No. 2007.99.6500

MS. ALICIA B. GORDON
PURCELL & ASSOCIATES
3170 Crow Canyon Place, Suite 220
San Ramon, CA 94583

Re: Revocation of New York Ruling Letter (NYRL) 896391; apricot puree.

DEAR MS. GORDON:

We have been asked to reconsider NYRL 896391, dated April 13, 1994. This ruling, issued to you, on behalf of your company, concerns the classification of apricot puree, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Facts:

In NYRL 896391, dated April 13, 1994, Customs classified an apricot puree product in subheading 2008.50.2000, HTSUSA, dutiable in 1994 at 12.5 percent *ad valorem*, as products of Argentina, entitled to duty free treatment under the Generalized System of Preferences. The homogenized apricot product contains no identifiable fruit pieces. The product has been prepared: washed, pined, sieved (using three sieves of differing apertures), concentrated by heat, and packed through "an aseptic drumming line" into 55-gallon drums. After importation, the apricot product is to be used to manufacture beverages.

Issue:

Whether the instant apricot product is classifiable in subheading 2008.40.0040, HTSUSA, or in subheading 2007.99.6500, HTSUSA.

Law and Analysis:

The General Rules of Interpretation (GRIs) taken in their appropriate order provide a framework for classification of merchandise under the HTSUS. Most imported goods are classified by application of GM 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official in-

terpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

The EN for heading 2008 (p. 152) refers to fruit "prepared or preserved otherwise than by any of the processes specified in * * * the preceding headings of this chapter." The articles in question are apricot purees. According to *Webster's New World Dictionary of The American Language, Second College Edition*, (The World Publishing Company 1972), the term "puree" denotes a thick, moist, smooth-textured form of cooked vegetables, fruits, etc., usually made by pressing the pulp through a sieve or by whipping it in a blender. The product is pulp that has been pressed through three sieves. As such, the pulp has in fact been "pureed." The word "puree" appears specifically in the heading 2007, HTSUS, the heading immediately preceding 2008, HTSUS. Therefore, it is our opinion the puree is properly classified in heading 2007 HTSUS, rather than heading 2008, HTSUS.

Holding:

The apricot puree is properly classifiable in subheading 2007.99.6500, HTSUSA, the provision for "Jams, fruit jellies, marmalades, fruit or nut puree and fruit or nut pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter: Other: Other: Pastes and purees: Other." The applicable rate of duty is free.

JOHN DURANT,

Director,

Tariff Classification Appeals Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF STACKABLE CD RACKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c) (1), Tariff Act of 1930 [19 U.S.C. 1625(c) (1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of stackable compact disc (CD) racks made of wood and steel wire. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before June 13, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Herminio M. Castro, Tariff Classification Appeals Division (202) 482-7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c) (1), Tariff Act of 1930 [19 U.S.C. 1625(c) (1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of compact disc (CD) racks made of wood and steel wire. Customs invites comments on the correctness of the proposed revocation.

In NY Ruling Letter (NY) 896635, issued on April 12, 1994, Customs ruled that the CD racks were classifiable as articles of iron or steel under subheading 7326.20.0050, Harmonized Tariff Schedule of the United States (HTSUS). NY 896635 is set forth in "Attachment A" to this document.

We now believe that the CD racks are properly classifiable under heading 7323, as other household articles of iron or steel.

Customs intends to revoke NY 896635 to reflect the proper classification of CD racks as other household articles of iron or steel in subheading 7323.99.9060, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters ruling 959513, revoking NY 896635, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 23, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 12, 1994.
CLA-2-73:S:N:N3:115 896635
Category: Classification
Tariff No: 7326.20.0050

MR. BEN BOWDEN
ASSOCIATED MERCHANDISING CORPORATION
1440 Broadway
New York, NY 10018

Re: The tariff classification of CD rack holders from Taiwan.

DEAR MR. BOWDEN:

In your letter dated March 8, 1994, you requested a tariff classification ruling. Your submitted samples will be returned to you as requested.

The subject items, which are approximately 18" in length, are described as follows:

- 1) item 128-258—Natural wood/steel wire stackable CD rack which holds 25 single or 21 single and 2 double compact discs
- 2) item 128-259—Black fiberwood/steel wire stackable CD rack which holds 25 single or 21 single and 2 double compact discs

Both items are considered composite goods, consisting of different materials or made up of different components. These items shall be classified as if they consisted of the material or component which gives them their essential character. In both instances, the steel wire imparts the essential character.

The applicable subheading for both CD racks will be 7326.20.0050, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of iron or steel wire, other. The duty rate will be 5.7% *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA-2 RR:TC:MM 959513 HMC
Category: Classification
Tariff No. 7323.99.9060

MS. MONA WEBSTER
TARGET STORES
33 South Sixth Street
P.O. Box 1392
Minneapolis, MN 55440-1392

Re: Stackable CD Racks; Headings 7323, 7326 and 4421; subheadings 7323.99.9060 and 7326.20.0050; Other Articles of Wood; Table, Kitchen or Other Household Articles of Iron or Steel; Other Articles of Iron or Steel; NY 896635, revoked.

DEAR MS. WEBSTER:

This is in response to your letter, dated June 28, 1996, on behalf of Target Stores, requesting reconsideration of NY 896635, dated April 12, 1994. In NY Ruling Letter 896635,

Customs classified stackable compact disc (CD) racks, items 128-258 and 128-259, under subheading 7326.20.0050 of the Harmonized Tariff Schedule of the United States (HTSUS), as articles of iron or steel.

Facts:

The two models of CD racks are made of steel wire and wood sides that together are capable of holding 25 single, or 21 single and two double CDs. They measure approximately 16 inches long by 6.5 inches wide by 5.5 inches high. The CD racks are identical in all respects, but for the finish on the wooden side panels. The wooden sides have a black finish (item number 128258) or a natural finish (item number 129-259). The CDs will be placed between and supported by the steel wires. Although they are sold individually, the CD racks are designed to be stacked one upon the other. The CD racks are packaged and sold in a box displaying a CD rack on a shelf of a wall unit along with books, a candle, and what appears to be a stereo or video component.

The provisions under consideration are as follows:

4421	Other articles of wood * * * 4%
*	* * * *
7323	Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel;
7323.91	Other:
	Of cast iron, not enameled:
7323.99	Other:
	Coated or plated with precious metal:
	Not coated or plated with precious metal:
	Other:
7323.99.9060	Other * * * 3.4%
*	* * * *
7326	Other articles of iron or steel:
	Forged or stamped but not further worked:
7326.20.0050	Articles of iron or steel wire Other * * * 4.6%

Issue:

Whether the CD racks are classifiable as household articles of iron or steel under heading 7323, HTSUS, as other articles of iron or steel under heading 7326, HTSUS, or as articles of wood under heading 4421, HTSUS.

Law And Analysis:

Merchandise is classifiable under the HTSUS, in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The CD racks are made of steel wire and wooden sides that together are capable of holding single or double CDs. The articles are described under heading 4421, as "Other articles of wood," heading 7323, as "* * * Other household articles of iron or steel" and heading 7326, as "Other articles of iron and steel."

GRI 2(b) states that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. The CD racks are

made up of two different components which together form an inseparable whole. Since the CD racks are composite goods, described in part by two or more headings, we must apply rule 3(b) which requires that composite goods are to be classified according to the component which gives the good its essential character.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized system. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Explanatory Note (VIII) to GRI 3(b), at page 4, states that the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

We believe the steel component imparts the essential character to the CD racks. The steel component is the largest, heaviest and most visually and structurally significant part of the article. The steel component provides the main function of holding the CDs and without it there could not be a rack. The wooden sides simply assist in this function, by providing support to the steel part and acting as a base to the article. In accordance with GRI 3(b), the CD racks are properly classified according to the constituent component of steel. Articles of steel are provided in Chapter 73, HTSUS. It was suggested that the merchandise is appropriately classified under subheading 7323.99.9060, HTSUS, based on the premise that the articles are intended to be used in the home to hold compact discs.

EN 73.23, at page 1123, indicates that heading 7323 comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for table, kitchen or other household purposes. The EN further provides that this group includes **other household articles** such as wash coppers and boilers; dustbins, buckets, coal scuttles and hods; watering-cans; ash-trays; hot water bottles; bottle baskets; movable boot-scrappers; stands for flat irons; baskets for laundry, fruit, vegetables, etc; letter-boxes; clothes-hangers, shoe trees; luncheon boxes. Accordingly, we must determine whether the CD racks are household articles.

The U.S. Court of International Trade (CIT) has noted *Webster's New World Dictionary of American English* 654 (3d College ed. 1988)'s definition of the term "household" as "of a household or home; domestic." The Court determined that when "household" is used with the term "articles" a use provision is created. *Hartz Mountain Corp. v. United States*, 903 F. Supp. 57, 59, CIT Slip Op. 95-154 (Sept. 1, 1995). The Court found the phrase "household articles" to be a use provision within the context of subheading 3924.90.50. Similarly, we believe that, within the context of heading 7323, when "household" is used with the term "articles" a use provision is created.

Additional U.S. Rules of Interpretation 1(a), HTSUS, states that in the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. The subject articles will thus fall under heading 7323 if they belong to the class or kind of articles principally used in the home. The Court has established various factors, which are indicative but not conclusive, to apply when determining principal use within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Hartz Mountain Corp.*, 903 F. Supp. at 59. In this instance, these factors are helpful in determining whether the CD racks are intended for home use.

The CD racks are made to hold CDs. They are packaged and sold in a box displaying a CD rack on a shelf of a wall unit along with books, a candle, and what appears to be a stereo or video component. They are sold by a retailer directly to the consumer as a merchandise which would organize a collection of CDs. The consumer will generally be expected to store such articles within the home. The evidence presented indicates that the CD racks are principally used in the home and that it would be impracticable to give them a different use. We therefore find that, since the CD racks will be used for household purposes, they are classifiable under subheading 7323.99.9060, as other household articles of iron or steel.

NY 896635 classified the subject merchandise in heading 7326, which provides for "Other articles of iron or steel." EN 73.26 states that this heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning milling or perforating **other than** articles included in the preceding headings of this Chapter or covered elsewhere in the Nomenclature. Since the CD racks are included in heading 7323, we find that they are precluded from classification under heading 7326. Accordingly, NY 896635 must be revoked.

Holding:

The stackable CD racks, items 128-258 and 128-259 are provided for in heading 7323. They are classifiable under subheading 7323.99.9060, HTSUS, as "table, kitchen or other articles of iron or steel: Other: Other: Not coated or plated with precious metal: Other: Other * * * Other." The rate of duty is 3.4% *ad valorem*.

Effect on Other Rulings:

NY 896635, dated April 12, 1994, is revoked.

JOHN DURANT,

Director,

Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF STENCILS AND PENCILS SET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of "Stencils and Pencils" Sets. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 13, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington D.C.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Food and Chemicals Classification Branch (202) 482-7061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of "Stencil and Pencils" Sets. Comments are invited on the correctness of the proposed ruling.

In Headquarters Ruling Letter (HRL) 950926, dated March 31, 1992, responding to a request for a tariff classification ruling for "Stencils and Pencils" Sets with a barnyard animal motif, the product was determined to be classifiable, under subheading 9503.90.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other toys; * * * parts and accessories thereof: Other: Other: Other toys (except models), not having a spring mechanism, HRL 950926 is set forth as "Attachment A" to this document. In HRL 951965, dated September 18, 1992, Customs affirmed HRL 950926, HRL 951965 is set forth as "Attachment B" to this document.

The ENs to heading 9017 state that heading 9017 covers "**Stencils** of a kind clearly identifiable as being **specialized as drawing instruments**. Stencils not so specialized are classified according to their constituent material." We now believe that the "Stencils and Pencils" Sets are classifiable under subheading 9017.20.9090, HTSUS, which provides for "Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: Other drawing, marking-out or mathematical calculating instruments: Other, Other."

Customs intends to modify HRLs 950926 and 951965 to reflect the proper classification of "Stencils and Pencils" Sets under subheading 9017.20.9090, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 959767 modifying HRLs 950926 and 951965 is set forth in "Attachment C" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 24, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, March 31, 1992.

CLA-2 CO-R:C:M 950926 KCC

Category: Classification

Tariff No. 9503.90.60

Ms. VIVIAN GONZALEZ
C-AIR INTERNATIONAL, INC.
11222 S. La Cienega Blvd.
Suite 470
Inglewood, CA 90304

Re: Stencils and pencils package; erasers; GRI 3(b); set; essential character; EN 90.17;
088323.

DEAR MS. GONZALEZ:

This is in response to your letter dated November 21, 1991, on behalf of Lisa Frank, Inc., requesting the tariff classification of "Stencils and pencils" and "Notepad" packages from Taiwan under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter and samples were forwarded to this office for a response. You have received the classification of the "Notepad" set in New York Ruling 869225.

Facts:

The article under consideration is a "Stencils and pencils" package which contains three small erasers, four colored pencils and one stencil which contains the outline of farm animals and a barn. All the articles are packaged together on cardboard which has a plastic cover. The invoice value of a package is 41 cents.

Issue:

What is the proper tariff classification of the "Stencils and Pencils" package under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." When goods are *prima facie* classifiable under two or more headings GRI 3 is applicable. In this case, classification is determined by application of GRI 3(b) which provides:

Goods put up in sets for retail sale shall be classified as if they consisted of the component which gives them their essential character.

To determine what is a "set put up for retail sale" the Explanatory Notes (EN) of the Harmonized Commodity Description and Coding System (HCDSCS) may be utilized. EN X to GRI 3(b) provides a three part test for "goods put up in sets for retail sale":

For the purposes of this Rule, the term 'goods put up in sets for retail sale' shall be taken to mean goods which:

- (a) consist of at least two different articles which are *prima facie*, classifiable in different headings;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

HCDSCS, Vol. 1, p. 4. The Explanatory Notes, although not dispositive, are looked to for the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. In addition, EN VIII to GRI 3(b) provides further factors which determine the essential character of goods. Factors such as bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods are to be utilized,

though the importance of certain factors will vary between different kinds of goods. HCDCS, Vol. 1, p. 4.

In the present situation, the "Stencils and Pencils" package consists of three different articles, each having different classifications (*e.g.*, erasers in heading 4016, pencils in heading 9609). The articles are put up together for a child to outline the animal and barn figures using the stencil and color pencils, color in the figures and erase any mistakes. The articles are packaged together for sale to the end user. Thus, the "Stencils and Pencils" package is a set.

We are of the opinion that the essential character of the "Stencils and pencils" set is the stencil. The stencil is the main feature of the set because the child will buy the package to be able to outline the animal figures on the stencil. The colored pencils and erasers merely facilitate the use of the stencil. Moreover, any type of writing instrument can be used with the stencil.

Heading 9017, HTSUS, provides for "Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof * * *". Explanatory Note (EN) 90.17 of the Harmonized Commodity Description and Coding System (HCDCS) states that this heading includes:

(A) Drawing instruments.

(1) **Pantographs and eidographs** for smaller, larger or same scale reproductions of maps, plans, drawings, parts to be machined, etc. The heading includes such instruments used for course plotting in navigation.

(2) **Drafting machines** generally using a system of parallelograms, with or without drawing boards or tables * * *.

(3) **Drawing compasses**, dividers, reduction compasses, spring bows, mathematical drawing pens, dotting wheels, etc., whether in a case (*e.g.*, drawing sets) or separately.

(4) **Set squares** (standard, hatching, wood or metal working) **adjustable squares**, **T squares** (standard or articulated), **drawing curves rulers** (flat, square, hatching (parallel rulers), standard, etc.).

(5) **Protractors**, from the ordinary protractors found in drawing sets to the complex protractors as used, for example, in engineering.

(6) **Stencils** of a kind clearly identifiable as being **specialized as drawing instruments** * * *.

HCDCS, Vol. 4, p. 1486.

The Explanatory Note language for stencils provides that Heading 9017 covers stencils " * * * of a kind clearly identifiable as being **specialized as drawing instruments**" (emphasis in original). Stencils which contain outlines of farm animals and a barn are not *ejusdem generis* with the drawing instruments identified in Heading 9017 and are not of a kind clearly identifiable as being specialized as drawing instruments.

The stencils are clearly designed principally for amusement, in this case, for children. The stencils are described as "Other toys * * *; Other toys * * *; Other: Other: Other toys (except models) not having a spring mechanism", and are classified in subheading 9503.90.60, HTSUS.

Pursuant to GRI 3(b), the remaining articles in the "Stencils and Pencils" package are classified with the stencils.

Holding:

The "Stencils and Pencils" package is classified as "Other toys * * *; Other toys * * *; Other: Other: Other toys (except models), not having a spring mechanism", and are classified in subheading 9503.90.60, HTSUS.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 18, 1992.

CLA-2 CO:R:C:M 951965 MBR
Category: Classification
Tariff No. 9503.90.60

AREA DIRECTOR OF CUSTOMS
NEW YORK SEAPORT
6 World Trade Center
New York, NY 10048

Re: Reconsideration of HQ 950926; "Stencils & Pencils" set; toy.

DEAR AREA DIRECTOR:

This is in reply to your memorandum of May 29, 1992, requesting reconsideration of HQ 950926, dated March 31, 1992, regarding the classification of the "Stencils & Pencils" set, under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The merchandise at issue is a set consisting of a 6.5" x 3.5" yellow plastic stencil depicting a rough outline of a farm and farm animals, four colored pencils, and three erasers (shaped like a cow, a rabbit, and a heart).

Issue:

What is the classification of the "Stencils & Pencils" set under the Harmonized Tariff Schedule of the United States (HTSUS)?

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part:

*** classification shall be determined according to the terms of the headings and any relative section or chapter notes ***

In HQ 950926 we classified the "Stencils & Pencils" set under subheading 9503.90.60, HTSUS, which provides for: "[o]ther toys: [o]ther: [o]ther: [o]ther toys (except models), not having a spring mechanism." The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to the HTSUS, regarding chapter 95, page 1585, state: "[t]his Chapter covers toys of all kinds whether designed for the amusement of children or adults."

You argue that: "[i]t must be pointed out that the stencils are not designed to amuse." We disagree. Samples are potent witnesses, and this sample speaks for itself. Every design feature of this article delineates its design for the amusement of children. The packaging itself is clearly directed towards the amusement of children, and is printed with letters, hearts and stars in pink, red, orange, blue, green, and yellow. The crudeness of the pencils, the stencils, and the erasers, limits their use to that of merely amusement. For example, it would be difficult, if not impossible, to accurately reproduce a likeness of anything using this pencils and stencils set.

You argue that the "Stencils & Pencils" set is classifiable in chapter 90. However, the Legal Notes to chapter 90 state:

1. This chapter does not cover:
 - (i) Articles of chapter 95.

Therefore, since it is emphatically our position that the set at issue is designed to amuse children, and is classifiable in chapter 95, it is therefore not classifiable in chapter 90, under any circumstances.

You argue that if the instant merchandise, which is designed for children, is classifiable as a toy in chapter 95, then consequently, all stencils (presumably whether or not for professionals such as architects, interior decorators, etc.) would also be classifiable as toys in chapter 95. We disagree. Only those articles which are "designed for the amusement of children or adults" are classifiable in chapter 95, and therefore excluded from chapter 90.

Holding:

The "Stencils & Pencils" set is classifiable in subheading 9503.9060, HTSUS, which provides for: "[o]ther toys: [o]ther: [o]ther: [o]ther toys (except models), not having a spring mechanism." For the above stated reasons, HQ 950926, dated March 31, 1992, is affirmed.

JOHN DURANT,

*Director,
Commercial Rulings Division.*

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR-TC:FC 959767 RC
Category: Classification
Tariff No. 9017.20.9090

MS. VIVIAN GONZALEZ
C-AIR INTERNATIONAL, INC.
11222 S. La Cienega Boulevard, Suite 470
Inglewood, CA 90304

Re: Modification of headquarters Ruling Letters (HRLs) 950926, dated March 31, 1992, and 951965, dated September 18, 1992; Classification of "Stencils and Pencils" Sets; Drawing Instruments.

DEAR MS. GONZALEZ:

Since the issuances of HRLs 950926 and 951965, Customs has reconsidered its position with regard to the proper classification of the "Stencils and Pencils" Sets, item no. P271, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Facts:

The merchandise at issue consists of a yellow plastic stencil, four color pencils, and three small erasers. The stencil, measuring 6.5-inches by 3.5-inches, depicts a rough outline of a farm and farm animals. The erasers are shaped like a cow, a rabbit, and a heart. The set is designed for use by children.

Issue:

Whether the "Stencils and Pencils" Sets are properly classified under subheading 9503.90.60%, HTSUSA, the provision for other toys or under subheading 9017.20.9090, HTSUSA the provision for other drawing instruments.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

In HRL 950926, we classified the "Stencils and Pencils" Sets under subheading 9503.90.6000, HTSUSA, the provision for: "Other toys: Other: Other toys (except models), not having a spring mechanism." That decision was based on the ENs to chapter 95, page 1585, that state, "[t]his Chapter covers toys of all kinds whether designed for the amusement of children or adults," and the finding that the stencils are designed to amuse. In HRL 951965, Customs affirmed HRL 950926. Upon further review of this matter we find that the "Stencils and Pencils" set is classifiable in chapter 90.

The "Stencils and Pencils" articles comprise sets put up for retail sale. The various components of the sets fall into at least two different headings. The stencil component contributes the greatest bulk, weight, and value, imparting the essential character to the sets. We find that the stencil is provided for in heading 9017, HTSUSA.

Heading 9017, HTSUSA provides for "[d]rawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators), instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof. * * *

The General Explanatory Notes to chapter 90 state:

There are certain exceptions to the general rule that the instruments and apparatus of this Chapter are high precision types. For example, the Chapter also covers ordinary goggles (heading 90.04), simple magnifying glasses and non-magnifying periscopes (heading 90.13), divided scales and **school rules** (heading 90.17) and fancy hygrometers, irrespective of their accuracy (heading 90.25), (Emphasis added.)

The ENs to heading 9017 indicate that, among other instruments, the heading covers drawing instruments. In addition to drawing instruments such as pantographs and eidographs, drafting machines, drawing compasses, rulers, drawing curves, various squares (set, adjustable, and "T" types), and protractors, the language of the EN indicates that heading 9017 includes a full range of protractors, from the ordinary found in drawing sets, to the complex as used in engineering. Furthermore, Chapter 90 provides for a wide range of rulers, including the aforementioned school variety.

En 90.17(A)(6), at page 1486, states that heading 9017 covers "**Stencils of a kind clearly identifiable as being specialised as drawing instruments.** Stencils not so specialised are classified according to their constituent material."

The term "drawing" is not defined in the text of the HTSUSA or the Explanatory Notes. When terms are not so defined, they are construed in accordance with their common and commercial meaning. *Nippon Kogaku (USA), Inc. v. United States* 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

According to Webster's *Ninth New Collegiate Dictionary*, 1990, the term "drawing" means "the art or technique of representing an object or outlining a figure, plan, or sketch by means of lines," while the term draw means "to produce a likeness or representation of by making lines on a surface." According to Webster's *Third New International Dictionary* (TNID), drawing means "the projection of an image or a series of points by the forming of lines on a surface (as by use of a pencil, pen, or etchers' point); the art or technique of representing an object or outlining a figure, plan or sketch by means of lines;" "draw" means "to produce by or as if by tracing a pen or other instrument of delineation over a surface; to represent by lines drawn;" and instrument means a "utensil; implement."

Webster's TNID defines stencil as "a material (as a sheet of paper, metal, thin wax, or woven fabric) that is perforated with lettering or a design through which a substance (as ink, paint) is forced onto a surface to be printed." The American College Dictionary' (1970), defines "stencil" as "a thin sheet of cardboard or metal cut through in such a way as to reproduce a design or ornament when color is rubbed through it." Although the stencil component of the "Stencils and Pencils" set is made of plastic, it otherwise fits the general dictionary definitions of stencils.

In order to better understand what is meant by the term "**Stencils of a kind clearly identifiable as being specialised as drawing instruments,**" we note that the tariff schedule refers specifically to "duplicator stencils" in Chapter 48. Duplicator stencils are classifiable according to their constituent material. Similar mechanical-type stencils, used for mimeographing, silk screening, printing, photography, etc., are classifiable according to their constituent material. In contrast, the instant stencil, is designed to be used manually, much like a common ruler or ordinary protractor. The tariff schedule impliedly intends the term "**Stencils of a kind clearly identifiable as being specialised as drawing instruments,**" to mean stencils used manually, distinguishable from mechanical-type stencils. Therefore, the instant stencil falls into heading 9017, as "**Stencils of a kind clearly identifiable as being specialised as drawing instruments.**"

We find that the design motif of the stencil is irrelevant to its classification. Other than being made of plastic, the instant stencil is 'virtually the same in principle as the stencils, used by both children and adults, defined in the dictionaries cited. We think the enjoyment

derived from the use of this article is secondary to the work performed to create a decoration. Therefore, the "Stencils and Pencils" Sets cannot be classified as toys.

We have reviewed HRLs 950926 and 951965 and believe they are in error with respect to the "Stencils and Pencils" Sets. The stencil component is clearly identifiable as stencils "specialised as drawing instruments," as contemplated by heading 9017. Therefore, the "Stencils and Pencils" Sets are classifiable in heading 9017.

Holding:

The "Stencils and Pencils" set is classifiable in subheading 9017.20.9090, HTSUSA, the provision for 'Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: Other drawing, marking-out or mathematical calculating instruments: Other, Other," dutiable at the general column one rate of 5.1 percent *ad valorem*.

For the reasons stated above, HRLs 950926 and 951965 are modified under authority of section 177.9(d), Customs Regulations (19 CFR 177.9(d)).

JOHN DURANT,

Director,

Tariff Classification Appeals Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 111 and 163

RIN 1515-AB77

RECORDKEEPING REQUIREMENTS; CORRECTION

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed rulemaking, correction.

SUMMARY: This document makes corrections to the document published in the Federal Register on April 23, 1997, which set forth proposed amendments to the Customs Regulations relating to recordkeeping.

FOR FURTHER INFORMATION CONTACT: Stan Hodziewich, Regulatory Audit Division, Washington, D.C. at (202-927-0999) or Howard Spencer, Regulatory Audit Division, Atlanta Branch at (770-994-2273, Ext.158).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 23, 1997, Customs published in the Federal Register (62 FR 19704) a Notice of Proposed Rulemaking which covered recordkeeping requirements and reflected legislative changes to the Customs laws regarding recordkeeping, examination of books and witnesses, regulatory audit procedures and judicial enforcement. These statutory amendments are contained in the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. This document corrects some errors published in the NPRM.

Several errors involved the discussion under the SUPPLEMENTARY INFORMATION portion of the document. As part of the background discussion under the heading "Recordkeeping Requirements", in the center column of page 19705, in the first full paragraph which refers to section 163.4 and discusses drawback documentation retention requirements, the document misstates the period of time that drawback records may be necessary to be retained. Customs did not include the three-year period after exportation that the claimant could wait before

filing the drawback claim in setting forth the number of years necessary to retain drawback documentation. Thus, the second sentence of the first full paragraph in the center column on page 19705 is incorrect. A drawback claimant has the ability to file a claim up to almost eight years from the date of importation: the export on which the claim is made may occur up to five years from the date of importation and the claim can be filed within three years from the date of exportation. The recordkeeping requirement runs from the date of payment, including a payment made under the accelerated payment program. If the claimant takes advantage of the full eight-year period and Customs pays the claim under the accelerated payment program, the supporting record must be kept three years from the payment date: a period of about eleven years from the date of importation.

It is noted that the same sentence discussed above on page 19705 also contains a typographical error by repeating the same clause that is being corrected in this document twice at the end of the sentence.

An additional error occurred in the "Other Sections Affected" portion of the background discussion. The third column of page 19706, in the second full paragraph, the document refers to the definition of records in "§ 111.1(f)". The listing of definitions in § 111.1 has been alphabetized and the reference to paragraph (f) was inadvertently retained. It should be removed. This oversight was also repeated in the text of the proposed amendment itself. In the center column of page 19708, in the proposed amendment of § 111.23(a), the reference to § 111.1(f) should read simply § 111.1.

CORRECTIONS OF PUBLICATION

Accordingly, the document (FR Doc. 97-10130) published in the Federal Register on April 23, 1997 (62 FR 19704) is corrected as set forth below:

CORRECTIONS OF THE BACKGROUND SECTION

1. On page 19705, in the center column in the first full paragraph, the second sentence should be removed and in its place, the following should be inserted: "It is noted that with this retention period for drawback records, it is possible that the total retention requirement for drawback records could extend to about eleven years from the date of importation. (A drawback claimant has the ability to file a claim up to almost eight years from the date of importation: the export on which the claim is made may occur up to five years from the date of importation and the claim can be filed within three years from the date of exportation. The recordkeeping requirement runs from the date of payment, including a payment made under the accelerated payment program. If the claimant takes advantage of the full eight-year period and Customs pays the claim under the accelerated payment program, the supporting records must be kept three years from that payment date: a period of about eleven years from the date of importation.)"

2. On page 19706, in the third column, in the second full paragraph, in the fourth, line the reference to "records in § 111.1(f)" is corrected to read "records in § 111.1".

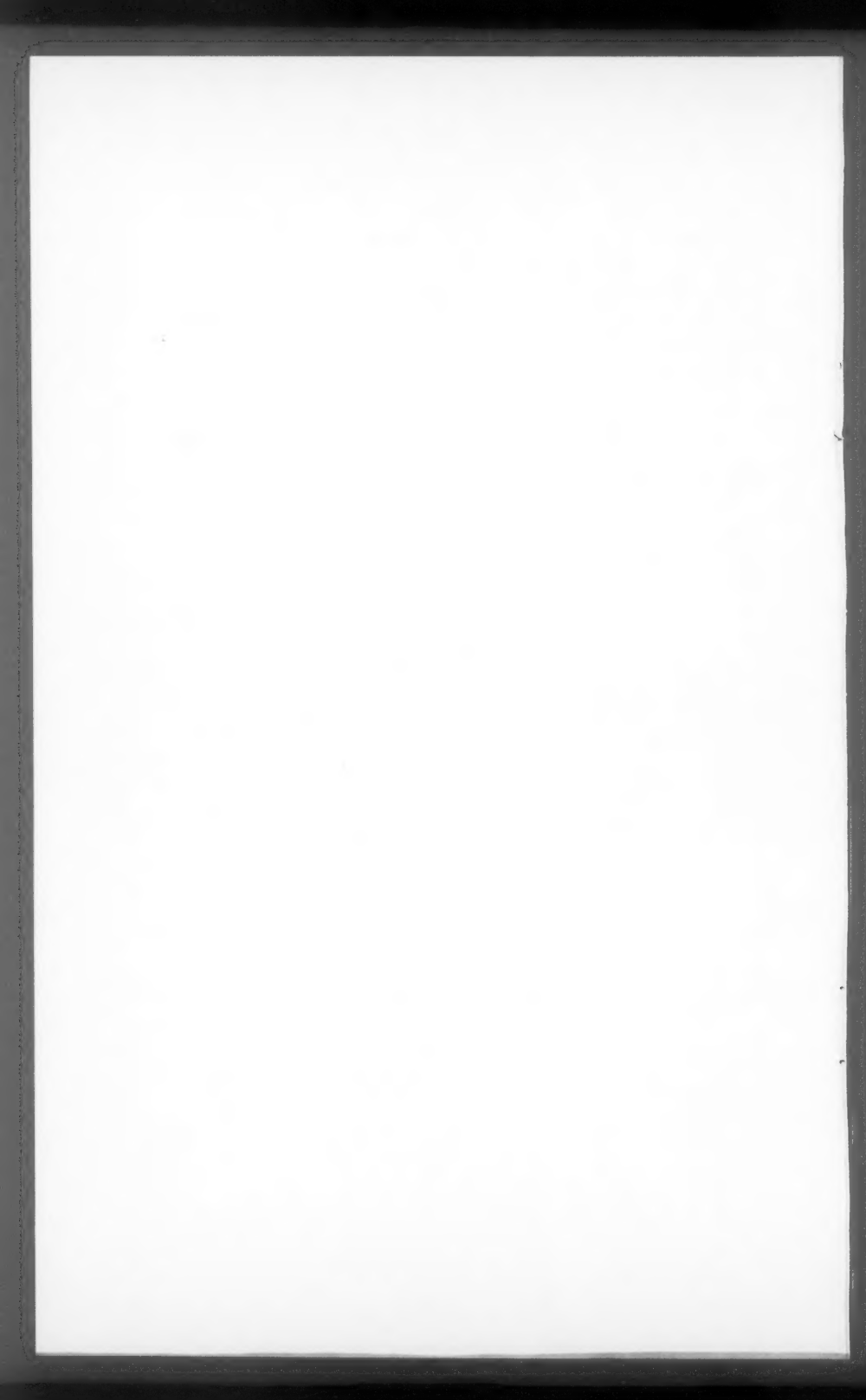
CORRECTION TO PROPOSED REGULATION

1. On page 19708, in the center column, in § 111.23(a)(1), in the second and third lines, the phrase "defined in § 111.1(f)" is corrected to read "defined in § 111.1"

Dated: April 29, 1997.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, May 5, 1997 (62 FR 24374)]



United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave

Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson
Herbert N. Maletz
Bernard Newman
Dominick L. DiCarlo
Nicholas Tsoucalas

Clerk
Raymond F. Burghardt



Decisions of the United States Court of International Trade

(Slip Op. 97-45)

UNION CAMP CORP, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND
DASTECH INTERNATIONAL, INC., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 94-08-00480

[Commerce remand results sustained.]

(Decided April 11, 1997)

Fenwick & West, Roger M. Golden and Phyllis E. Andes, Washington, DC, for Plaintiff.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director; *Velta A. Melnbrensis*, Assistant Director; *Cynthia B. Schultz*, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Stacy J. Ettinger*, Of Counsel, Office of the Chief Counsel for Import Administration, for Defendant.

Williams, Mullen, Christian & Dobbins, PC., *William L. Perry*, *Terry X. Gao*, and *David Sneed*, Washington, DC, for Defendant-Intervenors.

OPINION

WALLACH, Judge: This case is before the Court following remand to the Department of Commerce ("Commerce"), pursuant to this Court's order. *See Union Camp Corp. v. United States*, Court No. 94-08-00480, Slip Op. 96-123 (CIT Aug. 5, 1996) (order remanding case to the Department of Commerce).

Defendant and Defendant-Intervenors do not agree with some of the Court's conclusions in the Interlocutory Order found in Slip Op. 96-123. However, they agree that the Department of Commerce complied with the Court's directions.

Defendant and Defendant-Intervenors urge the Court to reconsider its decision to remand this case to Commerce. USCIT Rule 59 provides a procedure for parties to follow when seeking a rehearing and states:

A new trial or rehearing may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury or in an action finally determined, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States * * *

ing shall be served and filed not later than 30 days after the entry of judgment or order.

USCIT R. 59(a) and (b). "On its face, Rule 59 provides for rehearings in actions which have been tried and gone to judgment * * *. Nevertheless, it has been held that the 'concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury'." *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584, 623 F. Supp. 1262, 1274 (1985) (quoting *Timken Co. v. United States*, 6 CIT 75, 569 F. Supp. 65, 67 (1983), quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2804 at 35 (1973)), *rev'd on other grounds*, 6 Fed. Cir. (T) 70, 840 F.2d 1547 (1988). Therefore, the Court will consider the argument of Defendant and Defendant-Intervenor in light of Rule 59.

"The grant of a motion for rehearing, reconsideration, or retrial under Rule 59(a) is within the sound discretion of the court." *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990). The Court will not disturb its decision unless it is "manifestly erroneous". *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984).

"The purpose of a rehearing is not to relitigate a case." *Kerr-McGee Chem. Corp.*, 14 CIT at 583. Instead, it "is a method of rectifying a significant flaw in the conduct of the original proceeding." *Id.* This Court has stated:

A rehearing may be proper when there was: (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

Gold Mountain Coffee, Ltd., 8 CIT at 336-337, 601 F. Supp. at 214.

The failure of the parties to move for a rehearing, coupled with the Court's conclusion that its previous decision is not "manifestly erroneous", means that there is no reason to disturb the law of the case. "The law of the case doctrine holds that 'a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.'" *Chung Ling Co., Ltd. v. United States*, 17 CIT 829, 836, 829 F. Supp. 1353, 1360 (1993) (citing 1B James W. Moore *et al.*, Moore's Federal Practice ¶ 0.404[1] (2d ed. 1992)). In other words, it is "the practice of courts generally to 'refuse to reopen what has been decided.'" *Koyo Seiko Co., Ltd. v. United States*, 893 F. Supp. 52, 57 (1995) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 740 (1912)).

"Under this doctrine, a court will generally not reopen an issue already decided unless (1) the evidence in a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of law applicable to such issues, or (3) the decision was clearly erroneous and would work a substantial injustice." *Koyo Seiko Co., Ltd. v. United States*, 893 F. Supp. 52, 57 (1995). None of these three factors,

nor any other factor, exists to persuade the Court that it should disturb its previous decision.¹

The remand results are sustained.

(Slip Op. 97-46)

UNITED STATES OF AMERICA, PLAINTIFF v.
HITACHI AMERICA, LTD., AND HITACHI, LTD., DEFENDANTS

Court No. 93-06-00373

[The government sought to recover penalties and lost duties for tortious violations of customs laws. *Held*: Defendants' motion to dismiss the counts of fraud and gross negligence pursuant to Rule 41(c) of the Court of International Trade is granted. The motion to dismiss the negligence and aiding or abetting counts is denied. Hitachi America is liable for negligently violating customs laws and Hitachi Japan is liable for aiding or abetting Hitachi America in its tortious course of conduct.]

(Decided April 15, 1997)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*James W. Poirier*, *Cynthia B. Schultz*, and *Lesleyanne Kessler*); of counsel: *Judith L. Altman*, *Colleen M. Piccone* and *Alan C. Cohen*, United States Customs Service, for plaintiff.

Weil, Gotshal & Manges LLP (*John R. Wing*, *Lawrence E. Elder* and *Yoav M. Griver*) for defendant Hitachi America, Ltd.

Kirkland & Ellis (*William A. Streff*, *Eugene F. Assaf*, *Paul F. Brinkman*, and *David G. Norrell*) for defendant Hitachi, Ltd.

OPINION

MUSGRAVE, *Judge*: The government brought this action against Hitachi America, Ltd. ("Hitachi America") and Hitachi, Ltd. ("Hitachi Japan") in a bid to recover penalties and lost duties under 19 U.S.C. § 1592. The government alleged in the alternative that Hitachi America and Hitachi Japan are liable for violating customs laws by committing fraud, gross negligence, or negligence in connection with imported merchandise, and that Hitachi Japan is also liable as an aider or abettor. The Court entertains jurisdiction under 19 U.S.C. § 1582. The trial was conducted *de novo*. 19 U.S.C. § 1592(e)(1). For reasons which follow, the Court holds that Hitachi America is liable for negligent violations of customs laws and that Hitachi Japan is liable for aiding or abetting Hitachi America in its tortious course of conduct. Pursuant to 19 U.S.C. § 1592, defendants are jointly and severally liable for the \$1,545,970 penalty as-

¹ Defendant-Intervenor also argue that Commerce should be ordered to open its record to accept additional evidence. As recognized by Commerce:

The issue of what value to use as a surrogate value for octanol-2 was raised in the proceeding below and all parties had ample opportunity to submit evidence and to comment on the issue *** [Commerce] was able to comply fully with the Court's order without reopening the record.

Final Results of Redetermination Pursuant to Court Remand, at 9. The Court agrees with Commerce's conclusion.

sessed by the Court, and Hitachi America must remit an additional \$96,469, the remainder of lost duties it has not yet restored to the government.

BACKGROUND

This controversy concerns the importation of unfinished subway car components and parts delivered to the Metropolitan Atlanta Rapid Transit Authority (MARTA) during the 1980's. The MARTA project initially comprised the purchase of 30 subway cars (referred to as the "base buy") for use in the Atlanta, Georgia subway system. The project was subsequently extended by MARTA's exercise of 4 options for a total of 90 additional subway cars. MARTA's first request for bids did not contain the price adjustments at issue in this case. After MARTA rejected all the bidders' prices as too high, MARTA then revised the terms of the contract, which was entitled "Contract CQ-311", and incorporated two price adjustment clauses: an Economic Price Adjustment ("EPA") clause, by which MARTA assumed the risk of inflation on labor and material, and a Monetary Value Adjustment ("MVA") clause, by which MARTA guaranteed a fixed amount of yen for foreign-procured materials. Pursuant to the MVA clause, MARTA assumed the risk of a depreciation of the dollar but would also enjoy the benefit of any appreciation of the dollar. Hitachi Japan negotiated the contract with MARTA. A joint venture consisting of Hitachi America and C. Itoh America ("CIA") was awarded this revised contract on September 27, 1982. Contract CQ-311, which explicitly contained the EPA and MVA clauses, was publicly available. MARTA itself issued a press release indicating that the Contract included "\$3.7 million for projected currency exchange rate and inflation."

The subway cars consisted mainly of domestic content, some of which was exported to Japan and incorporated into the vehicles at Hitachi Japan's Kasado Works factory. The partially completed subway cars and components were then sold to C. Itoh Ltd. ("CIJ"), a Japanese corporation. CIJ is one of the world's largest trading companies, specializing in the purchase and sale of various merchandise throughout the world. Transactions between CIJ and Hitachi Japan were in yen pursuant to separate purchase orders. CIJ then sold the merchandise to the Hitachi America-CIA joint venture. Hitachi America was the importer of record, and imported the partially completed subway cars principally through the port of Savannah, Georgia. Hitachi America issued purchase orders to CIJ in dollars which referenced the EPA clause. The cars were then sent to MARTA's Avondale Yards in Atlanta for final assembly by U.S. subcontractors. CIA was the banker for the MARTA transaction. CIA maintained an account for Hitachi America from which customs duties were paid, and CIA paid CIJ in yen. CIA also invoiced and received payments from MARTA. CIA was responsible for paying domestic and foreign vendors, including CIJ, for the merchandise incorporated into the subway cars.

Pursuant to CQ-311, MARTA paid the joint venture of Hitachi America and CIA according to various progress points, called "milestones", which were based on the completion and delivery of the subway cars. The 250 milestone payments by MARTA were not and could not be directly correlated to the forty-one entries at issue in this case. The amount of EPA paid by MARTA was derived quarterly following the publication of various indices. The amount of EPA paid by MARTA could not be determined at the time of entry. The amount of MVA paid by MARTA was derived pursuant to a formula based upon the timing of various milestone payments. The amount of MVA paid by MARTA similarly could not be determined at the time of entry or correlated to specific entries of merchandise. Thus, at the time of each entry, neither the importer nor the U.S. Customs Service ("Customs") could determine the amount of future additional duties owed on any EPA and MVA payments.

A cost engineer at a Hitachi Japan's Kasado Works factory computed detailed budgets for various costs attributable to the MARTA project, including import duties. The amount of \$607,050 was allocated for Hitachi America's payment of import duties for the base buy of the first 30 cars. This duty budget included an estimate for duties on both EPA and MVA payments. The formula used to estimate EPA and MVA duty payments in the original budget was also utilized to calculate subsequent duty budgets for the 1st, 2nd, 3rd and 4th options, and the formula remained unchanged throughout the project. The total duty budget, including payments for EPA and MVA, was approximately \$2,000,000, and was allegedly held by CIA. At the end of the project in 1988, Hitachi America had approximately \$298,000 left over in this \$2,000,000 duty budget after the payment of approximately \$1,700,000 for import duties incurred on the base price of the imported merchandise. As the shipments began in 1984 and 1985, defendants discussed how to allocate EPA money that would eventually be received from MARTA. Hitachi America successfully negotiated to receive approximately 2.7% of the domestic EPA for additional duty on EPA payments. The defendants also agreed that if there were a budgetary shortfall in duties owed on the MARTA contract, Hitachi Japan would be responsible for the shortfall.

At the time of the first shipment of unfinished subway cars in 1984, Hitachi America and Hitachi Japan understood that EPA payments were dutiable. However, neither Hitachi America nor Hitachi Japan had prior experience with MVA adjustments. Whether such payments were subject to duty was apparently unclear to defendants at the time of the first shipment. The defendants observed that at the time of shipment, EPA and MVA amounts were not yet fixed, and thus the amounts of EPA and MVA payments could not be known at the time of shipment. Based on this fact and on their alleged past practice in previous long-term projects subject to escalation, the defendants decided that only the base price needed to be reported on the invoice submitted to Customs, and the escalation payments could be reported to Customs and tendered at

the end of the project. Many of the witnesses from Hitachi America and Hitachi Japan attested to their belief that the amount of duties could be finalized and paid after the ultimate liquidation at the end of the project. Some of the witnesses also testified that they expected Customs to request information from Hitachi America throughout the course of the project regarding the amount of escalation received from MARTA. Customs never issue any such requests to Hitachi America. In any event, the shipping invoice declaring the base price in dollars without reference to escalation clauses was presented to Customs by Hitachi America and was prepared with assistance from Hitachi Japan and CIJ. Hitachi America referenced "CQ-311" ninety-two times on entry documents over the course of the project.

On April 19, 1984, the Hitachi America official in charge of the MARTA project at that time accompanied by an official from Hitachi Japan visited Customs' office in Savannah, Georgia in order to discuss the MARTA importations. At trial, neither of these gentlemen could recall whether they discussed the EPA and MVA clauses or whether they provided a copy of the MARTA contract and the Hitachi America-CIJ purchase order to the Import Specialist. It is routine for National Import Specialists to request copies of contracts on long-term projects and to inquire about any escalation provisions contained therein. Hitachi America's customs brokers also held meetings with Customs in Savannah to discuss invoicing issues. It is unknown whether the customs brokers discussed invoicing or reporting requirements for EPA or MVA with the Savannah Import Specialist. After these meetings with Customs and some minor internal investigations, Hitachi America proceeded on the assumption that escalation clauses need not be listed on the invoice submitted to Customs and that any additional duties arising from escalation payments could be reported and paid at the end of the project. Although some of the Savannah Import Specialists involved in the pre-importation meetings were apparently available to testify, the government failed to produce any witnesses from the Savannah Customs office or the office of the National Import Specialist to testify as to whether there were discussions regarding the EPA and MVA provisions expressly referenced in the CQ-311 contract. The first importation of unfinished subway cars entered Savannah on June 16, 1984. The last of the forty-one entries at issue in this case was entered on June 29, 1988.

In 1986, due to the Plaza Accords which uncoupled the world's major currencies, the dollar depreciated precipitously against the yen. The depreciation of the dollar resulted in substantial MVA payments by MARTA to the joint venture. The hapless MARTA, which apparently failed to hedge in the futures market against potential currency fluctuations, became dissatisfied with this increased expense and refused to pay on MVA invoices for some time. This led to the filing of a lawsuit by the joint venture against MARTA which was eventually settled. During the middle of the project, Hitachi America began to analyze duty payments on the MARTA contract both to discover whether customs laws had been com-

plied with and to ensure that the correct amount of duty would be tendered to Customs upon the completion of the project. Although EPA was understood to be dutiable, there were considerable questions regarding the dutiability of MVA. Some questioned whether MVA was dutiable based on the fact that yen was being received by the Japanese parties: MVA had no impact on the amount of yen received by CIJ or Hitachi Japan. The internal investigations produced no changes in how Hitachi America responded to its obligations under customs laws.

In late 1987, as the MARTA project began to wind down, Hitachi America began considering how to calculate escalation duties and to pay Customs. By January 1988, defendants realized that Hitachi America might have to pay additional duties on MVA as well as on EPA. In April 1988, after considerable negotiations between Hitachi America and Hitachi Japan concerning which company's budget would be used for the additional duty expenses, Hitachi Japan agreed to allocate \$600,000 to Hitachi America to cover the expected amount of additional duties. Later in 1988, Hitachi Japan indicated that it was eager to resolve the duty matter as quickly as possible. Before paying any additional duties whatsoever, Hitachi America sought to confirm whether MVA was in fact dutiable. In the spring of 1988, Hitachi America finally retained outside counsel to determine whether MVA was dutiable. After determining that MVA was "potentially reportable", outside counsel advised Hitachi America not to tender EPA and MVA duties until the exact amount of duty on MVA payments had been calculated. This calculation was delayed because CIA refused to provide information requested by outside counsel showing the amounts CIA had paid to CIJ for the imported merchandise.

Ms. Crecco was the lay employee at Hitachi America who designed customs compliance programs at Hitachi America in the mid to late 1980's. Originally hired for clerical work in February 1984, she became a rising star in the company and received the highest awards for her performance. She worked with her future husband, Mr. Long, to design customs compliance programs and in 1986 she became the manager of the newly created Hitachi America Import/Export Department; in that capacity, she developed customs compliance programs and communicated with Customs regarding duty issues. Despite her responsibilities, Ms. Crecco was not effective in resolving the EPA and MVA duty issues before she left Hitachi America in July 1988. Instead, Ms. Crecco, who had contemplated becoming a Customs informant and collecting a moiety award for her services as early as 1986, became a government informant in March 1988. Ms. Crecco had been advising Hitachi America not to contact Customs in 1987 and 1988 in connection with the EPA and MVA duty issues, and in the summer of 1988, she delayed sending documents to outside counsel which were required to calculate those duties. At the same time, Ms. Crecco passed many internal Hitachistigating the MARTA project, including legally privileged information. After her departure from Hitachi America, Ms. Crecco arranged a lunch date in

November 1988 with Ms. Hansen (then Ms. Wilson), a Hitachi America employee still involved in the MARTA duty issues, in order to surreptitiously record admissions. Ms. Wilson related that outside counsel was in the process of finalizing his analysis and that "[Hitachi Japan] is ready to pay." In June 1988, outside counsel requested records of payments to Japan for the imported merchandise. Hitachi America tried on several occasions and by various means to obtain the payment information kept by CIA. CIA failed to provide that information to Hitachi America and allegedly suggested that it "let sleeping babies lie." Through Ms. Crecco's services, Customs became aware that Hitachi America was planning to make a prior disclosure, and Customs exercised a search and seizure warrant on Hitachi America's headquarters on April 4, 1989. A grand jury was convened to investigate criminal fraud but failed to indict. In 1991, Hitachi America paid \$851,385 in response to the Pre-Penalty Notice issued by Customs.

The complexity of the EPA and MVA duty issues is substantial. Before and during this trial there was significant disagreement within the government over how to appraise the entered merchandise and determine the amount of lost duties. In December 1990, the government performed an audit which determined that the joint venture received an aggregate of \$20,448,989 in unreported escalation payments from MARTA, roughly \$2,000,000 of which was due to EPA and the remainder to MVA. This initial audit determined that the dollar denominated lost duties on those unreported payments equaled \$851,455. The government performed a supplementary audit in 1994 to include contract modifications left out of the initial audit, and the supplementary audit determined that aggregate escalation payments from MARTA equaled \$22,766,284, resulting in an additional \$96,399 in lost duties. Combining the \$851,455 from the initial audit and the \$96,399 from the supplementary audit equals \$947,854 in lost duties. Based on this dollar theory of valuation, the total value of the entries was \$63,054,536, but by not reporting MARTA's escalation payments, Hitachi America reported an aggregate entered value of only \$40,288,252. For years, the government proceeded on the assumption that MARTA's dollar payments to the joint venture established the correct measure of lost duties. On the eve of trial, the government undertook an alternative calculation it presented to the Court based on the assumption that the relevant transaction might be represented by payments in yen from CIA to CIJ, resulting in a loss of revenue of \$750,536. This figure was revised during trial on June 3, 1996 to equal \$632,102. Finally, the government's appraisal expert testified on June 6, 1996 that over the previous weekend he underwent a last-minute "crystallization" of thoughts which convinced him that the government's original calculations based on MARTA's dollar payments to the joint venture should be utilized to calculate the amount of lost duties, and that \$947,854 represented the correct measure of lost duties. After 7 years of investigation and prosecution, substantial intra-government disagreement remains over the core issues.

On June 29, 1993, the government filed suit; this was one day before the defendants' waivers to a statute of limitations defense expired. Nearly seven weeks of depositions were taken beginning in the fall of 1995, and several of those weeks were spent deposing witnesses in Japan. The trial, which began on May 7, 1996 after a several month extension granted upon the government's last minute request, spanned nearly six full weeks. The government identified sixty-eight binders of pre-trial exhibits and called eighteen witnesses. This litany of witnesses did not include any Customs employees involved in the pre-importation meetings or any other meetings with Customs. The defendants moved to dismiss the case after the close of the government's case in chief and the Court granted the motion on the counts alleging fraud and gross negligence. The defendants elected not to present a case.

With this skeletal background in place, the Court turns to its discussion of the issues. The factual determinations appearing in the discussion constitute additional findings of fact by the Court but have been deferred in order to achieve an orderly presentation of the ultimate issues.

DISCUSSION

The government alleged in the alternative that Hitachi America and Hitachi Japan are liable for violating customs laws by committing fraud, gross negligence, or negligence, and that Hitachi Japan is also liable as an aider or abettor. The government's general argument is that a violation of the customs laws is a *per se* event, and is therefore punishable. Importers are required to disclose and report to Customs all information relevant to determining the dutiable value of merchandise. Escalation clauses such as EPA and MVA are material to determining the dutiable value of imported merchandise. Importers are therefore required (1) to disclose escalation clauses upon entry documents, and (2) to report escalation payments when they are received unless liquidation has been suspended or estimated duties have been deposited upon entry. When defendants entered the merchandise without specifically listing the escalation clauses on entry documents, they knew or should have known that they submitted materially deficient information relevant to the determination of dutiable value, even though none of the entry documents related to any particular payment, nor could they have done so. However, because they did not deposit estimated duties or arrange to suspend liquidation, they violated customs laws by not reporting escalation payments at the time they were received.

At the close of the government's case in chief, defendants moved for judgment or dismissal pursuant to Court of International Trade ("CIT") Rules 41(c) and 52(c). The Court granted the motion on the fraud and gross negligence counts but denied the motion with respect to the counts alleging negligence and aiding or abetting. The Court first addresses defendants' negligence and then articulates its reasons for granting defendants' motion under CIT Rules 41(c) and 52(c) on the fraud and gross negligence counts.

I. HITACHI AMERICA COMMITTED NEGLIGENCE

The statutes allegedly violated include 19 U.S.C. § 1484 ("§ 1484"), 19 U.S.C. § 1485 ("§ 1485"), and 19 U.S.C. § 1592 ("§ 1592"). Section 1484 requires that contract terms affecting the assessment of duties be disclosed on entry documents.¹ Section 1485 requires that importers immediately notify Customs of any transactions subsequent to entry that impact the correct price of the merchandise, and § 1592 creates liability for negligently submitting materially deficient pricing statements contrary to the directives of § 1484 or § 1485. Section 1592 sets forth the three bases of liability for customs penalty actions:

(a) Prohibition

(1) General Rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

For reasons which follow the Court holds that Hitachi America is liable for negligence under § 1592(a)(1)(A).

The penalty statute removes the breach element from the government's *prima facie* negligence case. Under the common law, the plaintiff's *prima facie* negligence case consists of demonstrating sufficient evidence of duty, breach, causation, and damages. In contrast, for simple negligence claims under the penalty statute, "[T]he United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." § 1592(e)(4). By shifting the burden to the defendant to show lack of negligence, § 1592(e)(4) derogates from the common law. This burden-shifting provision applies to a negligence claim as well as to a claim for aiding or abetting because § 1592(e) applies to any proceeding commenced "pursuant to section 1604 of [Title 19]", which includes an aiding or abetting violation under § 1592(a)(1)(A). The burden-shifting provision also applies to a claim for aiding or abetting because, as explained *infra*, the basis of liability for aiding or abetting a negligent act is itself negligence.

¹ While the importer referred, on entry documents, to the underlying contract, CQ-311, it did not attach copies of that document nor recite the escalations provisions of CQ-311 on the entry documents.

In order to assess defendants' liability for negligent acts, the Court adopts the definition of negligence appearing in Customs' regulation:

A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the *failure to exercise the degree of reasonable care and confidence expected from the person in the same circumstances in ascertaining the facts or drawing inferences therefrom, in ascertaining the offender's obligations under the statute*, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

Customs Service Revised Penalty Guidelines, 19 C.F.R. pt. 171 App.B(B)(1) (emphasis added). See also *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 43 n.5, 628 F.Supp. 207, 211 n.5 (1986) (quoting Customs' definition of negligence as authority for determining standard of care required under § 1592). Since § 1592 allocates the burden to show an absence of negligence (more technically an absence of breach) to defendants, the defendants bore the burden to show that they exercised reasonable care under the circumstances.

The government contends that had defendants exercised reasonable care in ascertaining their statutory obligations, they would have known of their obligations both to disclose escalation clauses on entry documents and to report future escalation payments at once. Fundamentally, defendants should have known of their disclosure and reporting requirements because they should have known that potential escalation payments are material to assessing the dutiable value of merchandise. With regard to the alleged disclosure violation, § 1484 provides in pertinent part:

[An importer of record] shall file (at the time required under paragraph 2(B) of this section) with the appropriate customs officer such other documentation as is necessary to enable such officer to *assess properly the duties on the merchandise* * * *.

(2)(B) The documentation required under paragraph (1) of this subsection with respect to any imported merchandise shall be filed with the appropriate customs officer *when entry of the merchandise is made* * * *.

§ 1484(a) (emphasis added). In order for a Customs official to assess properly the duties on merchandise, the official must be in possession of all information relevant to determining the dutiable value of the merchandise pursuant to the valuation statute, 19 U.S.C. § 1401a ("§ 1401a"). Under § 1401a, the preferred method for calculating dutiable value involves determining the "price paid or payable" for the merchandise. The government argues that since the price paid or payable included potential EPA and MVA escalation payments, then at the time of entry, Customs was deprived of information relevant to the proper assessment of duties and so violated § 1484.

The duty to report escalation payments as they were received allegedly arose under § 1485, which provides in pertinent part:

Every importer of record making an entry under the provisions of section 1484 of this title shall make and file therewith * * * a declaration under oath, stating—

(2) That the *prices set forth in the invoice are true*, in the case of merchandise purchased or agreed to be purchased * * *;

* * * * *

(4) That he will produce at once to the appropriate customs officer any invoice, paper, letter, document, or information received showing that any such *prices or statements are not true or correct*.

§ 1485(a) (emphasis added). The plain language of § 1485 obligates importers to report immediately to Customs any new information showing that the prices declared at entry were incorrect. The government argues that since escalation payments are part of the price paid or payable for the subway cars, then under the language of § 1485, defendants were obligated to report any escalation payments to Customs at once. Since they did not do so, and since they did not avail themselves of the statutory mechanisms allowing for the deferral of the reporting obligation, they violated § 1485.

The Court agrees with Hitachi Japan that because § 1484 and § 1485 by their terms apply only to importers of record, Hitachi Japan may not be held directly liable for a violation of these statutes: Hitachi Japan's liability may arise only via the aiding or abetting provision of § 1592. Although the government argued that Hitachi America was effectively controlled by Hitachi Japan, the government did not argue or demonstrate that the Court should pierce the corporate veil and treat Hitachi Japan as if it were in the shoes of Hitachi America; on the contrary, the government chose to sue defendants separately and treated them throughout as separate entities.

A. Hitachi America Did Not Fully Comply With Customs Laws When It Declared Incorrect Dollar Amounts On The Entry Documents:

The starting point for the overall analysis of negligence with respect to MVA is deciding whether the payment from the joint venture to CIJ was a dollar or a yen transaction. The reason for this is that the terms of the transaction determine the currency terms which must be disclosed on the entry documents. In particular, § 1481(a)(5) requires the importer to list on the invoice "[t]he purchase price of each item *in the currency of the purchase* * * *" *Id.* (emphasis added). The government asserts that the transaction between the joint venture and CIJ was in dollars. Since the invoice between Hitachi America and CIJ was denominated in dollars, was submitted to Customs, and served as the basis upon which Customs appraised the merchandise, the government infers that the contracting parties treated it as a dollar transaction and the Court should do likewise. Under this theory of the case, Hitachi America properly listed dollar denominations on the entry documents but was negligent for not listing the MVA clause on the invoice and for not reporting

MARTA's MVA payments upon receipt. Nevertheless, the government recognized that reasonable minds could differ on this issue and ensured that appraisal calculations founded on the yen transaction view were performed by its expert auditor and entered into evidence. Defendants maintain that the transaction between the joint venture and CIJ was in yen. As defendants explain,

All of the parties agree now that the records taken by the Government from CIA (not previously available to Hitachi [Japan] and [Hitachi America]) established that CIA, acting as the accountant on behalf of [Hitachi America] as part of the Joint Venture paid CIJ * * * in Japanese yen. In line with the exchange rate provision in the purchase orders between [Hitachi America] and CIJ, CIA had converted the dollar amounts shown on the purchase orders and CIJ invoices into yen using a constant exchange rate of 269.7 yen to the dollar. CIA then remitted the fixed payment in yen to CIJ, on behalf of [Hitachi America], regardless of the MVA amount CIA expected subsequently to recover from MARTA. Although CIA did later remit (also in yen) the additional EPA inflation escalation payments * * * to CIJ, it did not remit any additional MVA currency escalation payments to CIJ, since this transaction was already in yen.

Hitachi Japan's Post-Trial Br. at 33-34 (arguments "fully support[ed] and adopt[ed]" by Hitachi America (Hitachi America's Post-Trial Mem. at 21)); See also Hitachi America's Post-Trial Mem. at 18 ("[Hitachi America] received no separate invoices for MVA payments and the MVA clause did not change the value of the payments made to [Hitachi Japan] in Japan.")²

Since CIJ invoiced Hitachi America in dollars but was paid by CIA in yen, Customs' would normally view this arrangement as constituting a yen transaction:

Sellers and buyers occasionally specify a pegged rate of exchange which will apply to the sale of the goods. The pegged rate of exchange should be used only in determining which currency is the true currency of the transaction.

For example, if merchandise from Japan is invoiced in yen, but payable in U.S. dollars at the rate of \$1 for 250 yen, then the transaction is in dollars. Conversely, if the merchandise from Japan is invoiced in dollars, but payable in yen at the rate of 250 yen for \$1, then the transaction is in yen.

Fundamentals of Customs Tariff and Trade Operations 7-8 (1983) (emphasis added). On June 6, 1996, the government put on Mr. Wholey, a surprise witness allowed by the Court, as an expert in Customs appraisement matters. On direct examination, Mr. Wholey testified that in his view, the transaction between the joint venture and CIJ was a dollar transaction. Mr. Wholey explained that although he stated during his May 23, 1996 deposition that the transaction was in yen, over the week-

² Thus, because CIA invoiced MARTA for MVA payments but CIJ did not invoice Hitachi America for MVA payments, there was no illegal double invoicing for MVA in violation of 19 U.S.C. § 1482(b).

end before his testimony at trial his view underwent a crystalline transformation and he was now thoroughly convinced that the transaction was in dollars and that the appraisal of the merchandise should be based on the dollar amounts MARTA paid to the joint venture.

On cross examination, Mr. Wholey admitted that prior to his deposition he had expressed his opinion to the Justice Department that the transaction was in yen. Mr. Wholey was asked about a file provided to him by the Government to help him prepare for his expert testimony. Included in the file was a proposed draft of a brief on this case authored by a senior Customs attorney and an associated e-mail. Mr. Wholey stated that those materials made him aware that senior Customs attorneys as well as the chief of the Customs Penalties Branch believed that the transaction was in yen. He also testified that he agreed with Customs' view that since CIA did not send additional payments to CIJ for MVA receipts, MARTA's MVA payments to the joint venture would have been irrelevant for duty purposes if Hitachi America had properly listed on the invoice the fixed amount of yen that CIA sent to CIJ. On redirect examination, Mr. Wholey testified that he suddenly fell ill during his May 23, 1996 deposition and that he was thereby distracted, weakened, and tired at the time he expressed his opinion that the transaction was in yen. He also stated that when he originally received the file, he read the e-mail but not the draft brief prepared by Customs, and that none of the materials attached to the e-mail had influenced his testimony at trial.

The Court finds that the transaction was in yen and that Hitachi America negligently listed an incorrect dollar denomination as the currency of purchase on the entry documents in violation of § 1481(a)(5). The currency of purchase is a material element because it is explicitly required by statute and is an essential element to calculating dutiable value. The Court accords great weight to Customs' published fundamentals on the method for determining the currency of purchase. Although the Court sympathizes with Mr. Wholey's sudden illness at deposition, it must dismiss his last minute apostatic opinion as caprice. From the time the government solicited his expert opinion until the weekend before trial, Mr. Wholey was convinced that the transaction was in yen. That was the correct view according to Customs' routine interpretation. It also comports with common sense: CIA paid CIJ in yen. Moreover, as discussed *infra*, even if the valuation of the merchandise were ultimately based on a dollar transaction by virtue of the provisions of the valuation statute, that does not impinge the command of § 1481(a)(5) requiring the importer to list the purchase price in the actual currency of purchase. In their zeal to argue for the lower amount of lost duty which a yen transaction theory produces, defendants are magnanimously forthcoming with the asserted legal implications. If the

transaction between the joint venture and CIJ was in yen, the government would have a claim for

the mistaken treatment of the transactions on the entry documents as dollar-based, rather than yen-based transactions. [This] claim has not previously been asserted by the Government as a violation, would not properly be before this Court, and in any event, is answered by the undisputed evidence that Hitachi [Japan] and [Hitachi America] legitimately believed the transaction was dollar-based and did their best to obtain the correct information and documentation from CIA.

Hitachi Japan's Post-Trial Br. at 35-36 n.26 (arguments "fully support[ed] and adopt[ed]" by Hitachi America (Hitachi America's Post-Trial Mem. at 21)). On the contrary. The government asserted in its opening argument that the finding of a yen transaction would render the dollar denominations on the invoices false statements. Second, the trial was conducted *de novo* and the Court is unfettered in its discretion to identify violations of law. Third, even if it were true that Hitachi America did not know that CIA was remitting yen, the fact that Hitachi America might have been forced into a marriage of convenience with CIA does not permit it to rely conveniently on internuptial shenanigans as proof of reasonable care.

If a domestic joint venture bifurcates its banking and customs operations, the importer of record will be hard pressed to explain its failure to obtain basic information from its partner essential to compliance with customs laws. Furthermore, the Court wonders whether Hitachi America was ignorant that CIA was remitting yen when the evidence demonstrates that the two communicated with each other during the course of the importations. It does not follow from the fact that Hitachi America was unable to obtain payment records from CIA in 1988 that Hitachi America was not aware that CIA was remitting yen throughout the course of the project; to wit, a Hitachi America internal memorandum from February 1988 stating, "Some people feel the increase in contract amount and *the way money is transferred back to Japan*, makes MVA dutiable." (emphasis added). In a similar vein, the Court dismisses defendants' argument that CIJ controlled the preparation of the faulty commercial invoices as a futile blame shifting maneuver. Hitachi America is responsible for the contents of the invoice under the statute and absent proof of legal coercion, which was neither alleged nor proved, it may not dodge its obligations as an importer of record by pleading impotence. The government tried its case under the dollar theory. Defendants chose not to put on a case and in electing that strategy, they were confidollar theory. There is scant evidence that Hitachi America was in fact ignorant of the fact that yen was being sent abroad or that it attempted to so discover. A bald assertion that Hitachi America "legitimately believed" dollars were being sent abroad hardly suffices. Its obligation was to declare the true currency of purchase. It did not declare the true currency of purchase and failed to show that it exercised reasonable care in ascertaining the relevant facts about the transaction.

Hitachi America violated § 1481(a)(5) by stating an incorrect currency of purchase and was negligent in doing so. Notwithstanding this, the Justice Department was never able to agree with the correct view of the Customs Service that the transaction was in yen. It follows that if, over the years, Treasury (Customs) and Justice could not agree on the actual currency of the transaction that confusion on the part of the importer and its partners, while not entirely excusable, is at least understandable.

It follows from this discussion that Hitachi America negligently violated its obligations under § 1484 and § 1485 to declare accurately the price of the merchandise. Hitachi America understated the price of the merchandise because the dollar amounts it listed on the entry documents understated the value of the yen sent abroad—even though, as noted above, the entry documents did not and could not reflect the actual price of each shipment.³ Ascertaining the *amount* of currency sent abroad is just as basic to complying with customs laws as is ascertaining the type of currency sent abroad. Hitachi America failed to show that it exercised reasonable care to discover the amount of currency that was sent abroad for the same reasons that it failed to show that it exercised reasonable care to discover the type of currency that was sent abroad. The Court holds that Hitachi America negligently declared prices which, cumulatively understated the value of what was paid to the foreign seller.

The Court agrees with the government's client, Customs, that MARTA's MVA payments were irrelevant for duty purposes and therefore Hitachi America may not be held liable for failing to disclose the MVA clause on entry documents or for failing to report MVA receipts at once. If the transaction had been in dollars, then, akin to the Court's holding under its analysis of EPA, Hitachi America would have negligently failed to report the MVA payments as they were received.

B. Hitachi America May Not Be Penalized For Failing To Disclose The EPA Clause On Entry Documents:

Defendants argue that as a matter of logic and law, omitting references to escalation clauses on entry documents could not constitute a materially deficient statement actionable under § 1592. Potential escalation payments are not material because they are uncertain at the time of entry; in fact, it is possible that no escalation payments might be disbursed whatsoever due to an equilibrium of escalation indices; over time, an importer might even receive a lesser flow of currency from the purchaser if escalation operates to its translational detriment. Since the amount of escalation cannot be established at entry, escalation clauses cannot be material price terms as a matter of law. This argument is not entirely persuasive. Contingent payments may be material to the value

³ The understated yen amount would equal the dollar value declared on the entry documents times (269.7 yen to the dollar minus the yen to dollar exchange rate prevailing on the day the subway cars were shipped). See 31 U.S.C. § 5151 and 19 C.F.R. § 159.31-159.38.

of merchandise for the same reason that they are material to valuing a going concern.

The government argues that escalation provisions are material to the price of merchandise at entry as a matter of law and therefore must be disclosed in the entry documents. The Court agrees. Several cases have held that the issue of materiality is a matter for the Court. "[T]he measurement of the materiality of the false statement is its *potential impact* upon Customs' determination of the correct duty for the merchandise.' *United States v. Rockwell International Corp.*, 628 F.Supp. 206, 210 (CIT 1986) (DiCarlo, J.). That measurement of materiality would also apply to a false statement by omission." *United States v. Menard*, 16 CIT 410, 417, 795 F.Supp. 1182, 1188 (1992) (emphasis added). All parties agree that EPA payments affect dutiable value, so Hitachi America omitted referencing an item that had a potential impact on the correct duty and thus perpetrated a material omission. Nevertheless, the Court may not penalize defendants on this basis because the duty to report escalation clauses on entry documents was rendered turbid by a Customs ruling published in the Customs Bulletin.⁴

The government presented one Customs ruling published in the Customs Bulletin which concludes that escalation is part of the price of the merchandise at entry. In C.S.D. 82-121 (March 15, 1982), 16 Cust. Bull. 913 (1982), the importer requested a ruling on whether escalation receipts were considered part of the price of merchandise valued under the transaction value provision of the valuation statute and if so, how should the importer account for potential escalation receipts in calculating the correct amount of estimated duties to deposit upon entry. Customs ruled:

Concerning the escalation provisions in the contract, it is our opinion that where, as here, the formula for determining the escalation amounts was arrived at prior to the importation of the merchandise, *the escalation payments attributable to the dutiable portions of the contract price should be taken into account in calculating the price paid or payable. This is true even though the final and precise determination of the escalation amounts will not be known until some time after the shipment has arrived.* Of course, as you point out, 19 U.S.C. 1504(a) provides for a one-year limitation on the time within which to withhold liquidation on an entry, unless an extension of the time limit is granted pursuant to section 1504(b)***. In regard to the amount to be deposited as estimated duties, we recognize that the final amount of the escalation payments will not be known at the time of entry. Therefore, we have no objection to a deposit of estimated duties based on the contract purchase price***

Id. at 914. (emphasis added). The ruling states that potential escalation payments are to be considered part of the purchase price but that estimated duties equal to the contract price may be deposited upon entry in anticipation of future corrections. The government also located several

⁴ In fact the importer referenced CQ-311, the underlying contract containing the escalation clauses, more than ninety times on the entry documents.

rulings not published in the Customs Bulletin which concluded unsurprisingly that escalation payments are part of the price of the merchandise. HQ 543917 EK (Aug. 27, 1987); HQ 543089 CW (June 20, 1984); HQ 543252 MK (Mar. 30, 1984); HQ 543285 MK (Mar. 20, 1984); HQ 542975 (Mar. 9, 1983). If potential escalation payments are part of the price of the imported merchandise, then § 1484 would seem to require that escalation clauses be disclosed on the entry documents; the required specificity of such disclosure is not articulated.

Defendants do not deny the dutiability of EPA, but argue that there is no requirement to recite specifically escalation clauses on the entry documents. In support of their argument, they point to a Customs decision published prior to the first MARTA entry and subsequent to C.S.D. 82-121. In C.S.D. 84-78 (March 30, 1984), 18 Cust. Bull. 1030 (1984), which involved the duty consequences of *decreased* payments to the seller by virtue of refunds pursuant to currency fluctuation adjustments, Customs stated that "if the manufacturer and importer have agreed upon a formula under which to arrive at the price actually paid or payable, the importer should advise the appropriate Customs officer, *preferably* at the time of entry." *Id.* at 1032 (emphasis added). At trial, the government dismissed this ruling as mere "*dicta*" and attempted to distinguish it on the grounds that it involved a decrease in the price deemed paid rather than an increase. This explanation misses the point. In its discretionary function Customs fills out the law, most authoritatively by rulings published in the Customs Bulletin. In a strict sense all Customs rulings are *dicta* because they are not binding on the Court.

Regardless of whether Hitachi America actually relied on this ruling and in the absence of subsequent rulings expressly requiring disclosure of escalation clauses upon entry, C.S.D. 84-78 clouded the existence and exigency of the requirement, and a nebulous duty is a legal oxymoron. "[W]here the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulation, and may not be punished." *General Electric Co. v. EPA*, 53 F.3d 1324, 1333 (D.C. Cir. 1995). *General Electric Co. v. EPA* held that the agency was free to enforce its interpretation of the statute, but that imposition of a penalty was precluded by the Due Process Clause. *Id.* at 1334. *See also* *Lloyd v. Lockrem, Inc. v. U.S.*, 609 F.2d 940, 944 (9th Cir. 1979) ("We reiterate that [one] should not be held to standards, the application of which cannot be agreed upon by those charged with their enforcement"). Since the conflicting rulings published in the Customs Bulletin did not put importers on notice of what conduct was required, to penalize Hitachi America for its alleged violation would run afoul of the Due Process Clause of the U.S. Constitution. "Engrained in our concept of due process is the requirement of notice * * *. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. Califor-*

nia, 355 U.S. 225, 228 (1957). Had the government called a witness from Customs to testify on its behalf, perhaps it could have rehabilitated the clear implication of C.S.D. 82-121 by showing that actual Customs practice required disclosure. The Court holds that importers are required to disclose escalation clauses in entry documents but that Hitachi America may not be held liable because Customs confused the obligation by virtue of its own published rulings.

C. Hitachi America Is Liable For Negligently Failing To Report EPA Payments At Once:

The Court does hold Hitachi America liable under § 1485 for negligently failing to report EPA payments as they were received. Section 1485 obligates importers to report "at once" any receipts showing that the price declared on the invoice was incorrect. If an importer wishes to avoid this duty, there are two simple statutory mechanisms at its disposal. First, an importer may arrange to hold open liquidation under 19 U.S.C. § 1504(b): "The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer * * * if * * * the importer * * * requests such extension and shows good cause." *Id.* Second, as illustrated by C.S.D. 82-121, an importer may deposit estimated duties and when the merchandise is liquidated "[t]he appropriate Customs officer shall collect any increased additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation." § 1505(b).

Defendants do not contest the dutiability of EPA but counter that because the final amount of escalation cannot be determined until the end of the project, "at once" for long-term importations means after completion of the contract. This argument is the logical extreme of the position already rejected by the Court and countered by C.S.D. 82-121 that uncertain escalation payments cannot be material to the price at the time of entry as a matter of law and logic. To indulge the argument, the position that escalation payments can only be material to the price of imported merchandise when the aggregate becomes known does not comport with common sense. Take MARTA's MVA payments as an example. Assume for a moment that CIA was remitting dollars to CIJ so that MVA payments were part of the price of the merchandise. The joint venture received over eighteen million dollars in MVA payments. Much of that money was accumulated long before the end of the project. It is pure vagary to maintain that sums certain are not material until the cumulative certainty has materialized. Surely a putative investor in the joint venture would rely on the accumulated amount in making investment decisions. EPA payments are material to the price of merchandise and must be reported at once to Customs absent alternative arrangements pursuant to statute.

Customs rulings uniformly state or entail that uncertain escalation payments are material to the price of the merchandise, giving notice to importers that they must report escalation receipts at once unless liquidation has been suspended or estimated duties have been deposited.

C.S.D. 82-121 concludes that escalation payments are part of the price of merchandise and permits a deposit of estimated duties based on the contract price; it does not permit the importer privately to run a tally and pay the aggregate in the end, but envisages an adjustment to the dutiable value when the adjustment amount applicable to the entry becomes known. Even defendants' claimed reliance on C.S.D. 84-78 declares that "transaction value will be represented by the price actually paid or payable, to be established by *corrected invoices* * * *." *Id.* at 1032 (emphasis added). Now, even if Customs allowed a lowering of the dutiable price in C.S.D. 84-78 despite the importer's failure to disclose the escalation clause upon entry, to interpret the ruling as permitting the importer to run a tally of adjustments over several years and announce the aggregate at the end is not a fair reading. The fair reading is that importers must deliver corrected invoices, or as here, when the invoices can never be accurate, some other notification to Customs should be made when the importer discovers the amount of the adjustment.

Defendants cite the following example in a futile attempt to identify a published Customs' position announcing that EPA may be paid at the end of a long-term project:

Q. The merchandise undergoing valuation is a partial shipment of a larger order against a long-term contract, containing escalation clauses that will not be finalized until the contract is completed. How would the price actually paid or payable be determined for the merchandise being appraised?

A. *Keeping in mind the requirement for one-year liquidation, appraisement could be withheld until the amount actually payable (after completion of the contract) could be determined.* Current practice in such situations is about the same.

Department of the Treasury, U.S. Customs Service Office of Commercial Operations, *Customs Valuation under the Trade Agreements Act of 1979* 78 (1981) (emphasis added). As the government points out, the example contemplates payment within the normal liquidation period. Were this not so, the Court would be compelled to hold that the duty to pay at once was nebulous and Hitachi America could not be penalized for accumulating EPA without reporting to Customs. However, the plain language of § 1485 combined with Customs' published rulings put importers on notice that escalation payments must be reported at once unless other arrangements have been made. Hitachi America violated § 1485 by not reporting escalation payments upon receipt.⁵

Once the violation was established, Hitachi America had the burden to show that it exercised reasonable care under the circumstances to ascertain its statutory obligations. Defendants argue that the evidence confirms Customs' acquiescence in their alleged past practice to pay EPA at the end of long-term projects. Were this true, it would be evidence tending to show that Hitachi America acted reasonably under the

⁵ The fact that the 250 milestone payments could not be directly correlated to entries does not influence the analysis. Importers may not avoid their obligations under the law by structuring transactions so that payments do not correlate to entries.

circumstances because it may have been lulled into a belief that reporting EPA at the end was acceptable under Customs' practice. However, the Court is not persuaded that the events cited actually rose to the level of a "past practice". Before delivering its analysis on that issue, the Court remarks that even if there were such a past practice, it would not operate to estop the federal government from enforcing the statute. Despite the harsh consequences, the federal government is not estopped to enforce laws against citizens who were advised by government officials that their actions were legal when the government later ascertains that such actions were not in compliance with the law. *OPM v. Richmond*, 496 U.S. 414 (1990); *Melex USA, Inc. v. United States*, 19 CIT ___, 899 F.Supp. 632 (1995).

To support the allegation of a past practice, defendants point to a 1989 exchange between Hitachi America's Import/Export Planning Manager and the San Francisco District Director of Customs. The Import/Export Department Manager, who was in charge of customs compliance, wrote to the District Director in order to make a "voluntary tender" of duties on currency escalation adjustments remitted by Hitachi America to Hitachi Japan in connection with a multi-year project. Attached to the letter is a list of entries involved, some which had liquidated and some which had not, and a column showing the entries upon which additional duty was tendered. The District Director accepted the check for the duties and replied that the sum remitted "does *not* need to be a prior disclosure." (emphasis in original). If it had been considered a prior disclosure under § 1592(c)(4), Hitachi America would have been liable for penalties under that section up to two times the amount of lost duties for fraudulent retention of the duties owed or for interest if gross or simple negligence were involved. No one with personal knowledge of the exchange testified, and the document speaking for itself says little about a past practice to pay EPA duty at the end of projects. The document indicates that not all of the entries involved in the project had liquidated. All that the document and the reply from Customs show with certainty is that on one occasion, a District Director communicated to Hitachi America that a tender of EPA, other than at the time of entry, during the course of a project was not actionable, under the voluntary disclosure provision. Defendants chose not to call a witness to testify regarding the circumstances of this event, and the Court will not infer anything more than what is implied by the document. Defense counsel did exact testimony from Ms. Crecco, the former Import/Export Department Manager, that the form of the letter to Customs was similar to the form of letters she composed when she made other voluntary tenders.

A document in evidence shows that Ms. Crecco herself made a voluntary tender of EPA duties on behalf of Hitachi America in August 1985 and she testified Customs had not sought penalties under the prior disclosure provision in connection with those withheld duties. Defense

counsel pursued Ms. Crecco's history of making voluntary tenders of EPA during her employment with Hitachi America:

Q. And during the course of your professional activities at Hitachi America, you did in fact make voluntary disclosures, didn't you?

A. I made—I made voluntary tenders of duty along the lines we have just discussed, such as the EPA types.

Q. In fact, is it fair to say that every voluntary disclosure you made at Hitachi America involved EPA, to the best of your recollection?

A. I'm not so sure about that, Mr. Assaf.

* * * * *

Q. And in any of the voluntary disclosures that you were involved in * * *, did Customs ever tell you that Hitachi America was engaged in fraud?

A. I don't think so, no.

Tr. 2316-17. Now it is clear from this testimony and Ms. Crecco's August 1985 letter to Customs that she made plural voluntary tenders of EPA to Customs without adverse consequences. However, the ambiguous documents from 1989 discussed above, Ms. Crecco's testimony that there were incidents in which she made voluntary tenders of EPA without adverse consequences, and the parade of Hitachi officials testifying about a past practice of which they had no personal knowledge do not imprint the canvas with sufficient points of reference from which the Court may extrapolate a pattern of conduct establishing a "past practice". The conclusion which follows is that defendants did not demonstrate a state of mind such that a belief in the acceptability of their conduct is the only circumstance under which Hitachi America's exercise of reasonable care should be analyzed.

The evidence demonstrates that Hitachi America was negligent by failing to exercise reasonable care in ascertaining its duties to report EPA. Internal corporate documents sent between Hitachi America and Hitachi Japan in 1984 before the first entry show Hitachi officials expressing the opinion that although EPA was subject to duty, in other long-term projects the base price was listed on the commercial invoice and additional duty was paid later without objection by Customs. In responding to a February 1984 telex from Hitachi Japan suggesting that it was permissible to list the base price on the invoice, Mr. Toda, the Hitachi America official in charge of the MARTA project at that time, replied that in past projects the base price was listed "and the escalation portion must have been dealt with at the time of duty liquidation." Mr. Toda testified that he understood liquidation procedures at the time he sent this telex, but thought that EPA was dutiable at the end based on Hitachi America's prior experience in long-term projects. Notwithstanding his familiarity with liquidation procedures and his knowledge that EPA was dutiable, Mr. Toda failed to arrange for suspended liquidation of the MARTA entries in 1984. Mr. Toda apparently had some understanding of what mechanisms to pursue in order to resolve customs issues. For example, just prior to the MARTA entries, Mr. Toda resolved the prob-

lem of inconsistent F.O.B. prices appearing on MARTA project entry documents by consulting the Savannah and Chicago offices of the Customs Service, a customs broker, and the Hitachi America legal department. Yet Mr. Toda declined to consult these same resources regarding his imminent awareness of the EPA reporting issue and instead turned to Ms. Crecco for advice, an employee hired in February 1984 who was in charge of customs compliance programs.

In a report written in 1984 before the first MARTA entry, Ms. Crecco advised Mr. Toda that he should (1) arrange for suspended liquidation or (2) deposit estimated duties. Initially, Mr. Toda accepted Ms. Crecco's advice and decided to deposit estimated duties. He sent Ms. Crecco's memorandum to Hitachi Japan and stated "Please find enclosed a memorandum issued by our legal group[*sic*] about duty liquidation. [Hitachi America] will take up the second option for the project." In mid-April, Mr. Toda held a discussion with an official from Hitachi Japan and reversed his initial decision to deposit estimated duties. Mr. Toda testified that he had no recollection about why he changed his mind. The government argues that by not following Ms. Crecco's advice he rejected advice from Hitachi America's legal department. Ms. Crecco was communicating at that time with Mr. Long, in-house counsel at Hitachi America and her future husband, and copied him on her memo. Ms. Crecco testified that at the time, she was working with Mr. Long on developing a customs compliance program. However, Ms. Crecco's interface with a member of the legal department does not enshrine her as legal counsel. In any case, it was not Mr. Toda's failure to follow Ms. Crecco's advice but rather his failure to consult Customs officials, customs brokers, or *bona fide* legal counsel from within or without Hitachi that compels the Court to conclude that he did not exercise reasonable care.

Mr. Toda did follow Ms. Crecco's advice to meet with an Import Specialist in Savannah, Georgia to discuss the imminent importations. This meeting took place on April 29, 1984 in Savannah. In such pre-importation meetings involving long-term multiple-entry projects, it is routine for Customs to request copies of the purchase order or underlying contract and to inquire about any escalation clauses. The record of this case shows that the files generated from these Savannah and subsequent meetings regarding the contents of the commercial invoice were destroyed by the government *after* it commenced its investigation of the MARTA project. The government proffered no reason for this clearly suspicious behavior. Mr. Toda was unable to recall any specifics of the meeting and the government did not call as witnesses any Customs officials who had been involved in those meetings.

Mr. Taga replaced Mr. Toda and became responsible for the MARTA project in early 1985. Mr. Taga testified that he was generally familiar with liquidation procedures at the time. He became aware that the MARTA project involved EPA payments almost immediately because one of his first assignments was to draft a purchase order to CIJ which included references to EPA. In the summer of 1985, Ms. Crecco wrote

her letter announcing the voluntary tender of withheld EPA on another major Hitachi America program called the Fairfield Big Rivers Project. In her letter, Ms. Crecco wrote:

At the time of entry [in 1982], [Hitachi America] had not been billed for the escalation amount owed to [Hitachi Japan] and was also not aware of the requirement to advise Customs of a pending increase in transaction value. These requirements have now been informed to responsible [Hitachi America] personnel so that appropriate entry procedures can be followed for future entries.

The government argues that because Mr. Taga was the supervisor of the Fairfield Big Rivers Project, and thus he was one of the people Ms. Crecco "informed". There are two problems with this argument. First, the evidence did not demonstrate that Mr. Taga received or read the letter or actually was informed by Ms. Crecco; Mr. Taga's stamp was not on the memo and he testified that he had never seen the letter before it was produced to him at trial. Furthermore, the letter only refers to the disclosure of escalation clauses, not the reporting of escalation payments.

In the spring of 1986, Mr. Taga became concerned about the fact that MARTA entries were liquidating and asked Ms. Hansen (who was Ms. Wilson at that time), a future Assistant Sales Manager of Hitachi America, to look into MARTA duty issues. Mr. Taga apparently wished to ensure that Mr. Toda had made all the proper arrangements to comply with applicable customs laws and that Hitachi Japan had allocated enough duty budget to Hitachi America to cover escalation duties. Ms. Hansen researched the issues and found that Mr. Toda had not arranged for suspended liquidation. She became convinced that Mr. Toda had committed an error: "The mistake that was made was at the time of the first importation, they did nothing to declare the contract and say we have an escalation clause in there, please keep the liquidation open until the whole contract is settled." Tr. 1589. Ms. Hansen memorialized her convictions in her April 21, 1986 weekly report which she shared with Mr. Taga:

The actual procedure required by customs is that when an import is subject escalation and MVA, customs is to be advised of this fact. Based on this information all entries relating to project would then be left open; not liquidated, until the project is complete and the price increase or decrease has been settled. Since this was not done, we need to determine what the actual value of the first fifty cars is and do a catch-up payment to customs. At the same time advise them of our oversight/misunderstanding and that future shipments on this contract are subject to same terms. Once all information is received and analysis is complete, I will discuss our status and recommend action to be taken with all involved parties within [Hitachi America/Hitachi Japan].

Ms. Hansen, whom the Court found to be a credible witness, testified that she based these conclusions on advice from Ms. Crecco, who was by then head of the Import/Export Department in charge of Customs compliance. Ms. Crecco was coordinating her activities with her future hus-

band Mr. Long, who himself was the in-house lawyer formally in charge of the MARTA project. Ms. Hansen testified that she was nevertheless informed by Ms. Crecco that Hitachi America need not change the way it was dealing with the MARTA importations. Ms. Crecco admitted that in the fall of 1986 she did not tell Ms. Hansen to go forward and report EPA payments to Customs. Ms. Crecco testified that in 1986, she had not contemplated becoming a Customs informant and collecting a moiety award; however, defense counsel read her deposition into the record in which she stated that she first contemplated taking that action "in the early 1986 time frame." Tr. 2330. Therefore, according to Ms. Crecco, at the time she advised Ms. Hansen not to change the procedures of the company vis-a-vis customs compliance, she already entertained visions of subordinating her duties to a potential monetary reward. Ms. Hansen testified that subsequent to writing her weekly report she learned from a different Hitachi America employee with experience on long-term projects that Hitachi America had paid EPA at the end of long term projects or when Customs sent information requests inquiring about escalation payments. In any event, Mr. Taga testified that although he read Ms. Hansen's report, he neither assigned in-house counsel nor retained outside counsel to investigate the issues.

Meanwhile, Mr. Long was also at work. *Sua sponte* he drafted a letter to Mr. Taga on October 16, 1986 citing C.S.D. 82-121 for the proposition that escalation payments were dutiable and stated that EPA payments from MARTA "have not been reported to U.S. Customs for duty payment purposes. This failure to report dutiable payments may be a violation of U.S. Customs law." In the letter Mr. Long also speculated that roughly \$400,000 plus interest was owed to Customs and that Hitachi America should "negotiate with Customs with regard to moneys owed"; Mr. Long also advised that outside counsel should be retained to help resolve the issues. On the draft, which was not on Hitachi America letterhead, Mr. Long copied Ms. Crecco, Ms. Hansen, the President of Hitachi America, and the General Manager of Hitachi America. Mr. Long testified that Mr. Taga was furious that Mr. Long had copied senior management and ordered him to remove senior managements' names from the list of people copied. However, the draft does not bear Mr. Taga's stamp. The final letter of October 29, 1986, which is identical to the draft but for the removal of senior management from the list of people copied, does bear Mr. Taga's stamp; Mr. Taga testified that he then read the letter and became alarmed that someone from the legal department believed that Hitachi America had violated customs laws. Mr. Taga still did not retain counsel or make any inquiries to other knowledgeable sources.

Shortly after receiving Mr. Long's memorandum, Ms. Hansen suggested to Mr. Taga that he hire an attorney to investigate the duty issues. Ms. Hansen testified that Mr. Taga declined to do so:

In substance, [Mr. Taga] conveyed to me that he would continue discussing with people in Tokyo to get them to understand the situation further and build the consensus towards getting to that step,

that it was going to take a little longer, that we couldn't just hire the lawyer, there was no money, there was no understanding that there was an issue yet.

Tr. 1721. Ms. Hansen testified that she understood that the consensus building was required because of the large amount of money Hitachi Japan would have to allocate to Hitachi America to cover both EPA and potential MVA duties; at the time, Hitachi officials were uncertain whether MVA was dutiable. Mr. Taga could not remember ever consulting legal counsel about the duty issues and testified that he relied on Ms. Hansen's advice because she was working with the legal department. Notwithstanding Mr. Taga's belief that Hitachi America's past practice was to pay EPA at the end, he was clearly on notice that there might be a problem with doing so. His failure to involve any knowledgeable sources persuades the Court that Mr. Taga acted negligently.

Ms. Hansen continued working on the duty issues for some time and in the summer of 1987, Mr. Yamasaki, the official from Hitachi Japan overseeing the MARTA project, met with Ms. Hansen. His report on the trip indicated he discussed the duty issues with Ms. Hansen and that Hitachi Japan would undertake a separate study of the issues. In his calculations of duty budget allocations for Hitachi America, Mr. Yamasaki had always included projected amounts to cover EPA and MVA duties. Near the end of 1987, Ms. Hansen discussed the issues with Mr. Hisada, who was scheduled to replace Mr. Taga in February 1988. Various officials from Hitachi Japan also attended that meeting, and in January 1988, one of them faxed Ms. Hansen and stated that Hitachi Japan understood it would have to pay any additional duty on EPA and MVA, and requested her to calculate the amount that would be due. Due to the large amount of MVA payments from MARTA, Hitachi Japan would have to allocate additional funds to Hitachi America to cover the liability.

In February 1988, Ms. Hansen prepared a memo entitled "Finalization of Duty Liability" at Mr. Hisada's request, noting that "the main concern at this point is to ensure that all obligations to U.S. Customs had been fulfilled by [Hitachi America]". One of the issues identified was that the dutiability of MVA had to be determined. Regarding EPA, Ms. Hansen estimated that \$93,000 in duty would be owed on the entries that had already liquidated. Ms. Hansen memorialized that she had been informed by the Import/Export Department (*i.e.*, Ms. Crecco) that Hitachi America should not pay duty on EPA until the dutiability of MVA and the amount owed was resolved. Ms. Hansen recommended that the Import/Export Department should "work with a lawyer specializing in Customs matters" to determine the dutiability of MVA.

In the middle of March 1988, Mr. Hisada met with an official from Hitachi Japan to discuss the issues. It was confirmed that the \$300,000 previously allocated to pay for duty could be used to pay duty on EPA and to hire a customs lawyer. On March 15, 1988, Ms. Crecco sent her letter

to Customs' Office of Intelligence offering her services as an informant. She wrote:

I would like to have the opportunity to provide the Customs Service with information relating to the nonpayment of duty exceeding \$1,000,000 and to make a claim for compensation as provided for in the above referenced regulation.

The merchandise involved has entered the United States at more than one port over a period of two years. For some time, the importer has been aware that the invoice value presented to Customs for the purposes of calculating the duty payable at each importation is significantly undervalued. Although company management has been advised of the implications of such an omission, it has decided not to proceed with corrective action* * *.

I have made several attempts to communicate this issue to the Customs Service* * *.

In late March, Ms. Hansen asked Ms. Crecco to recommend an outside attorney specializing in Customs matters. Two months later and after a message from Hitachi Japan declaring that it was "eager" to settle the issue, Ms. Crecco sent a letter to outside counsel but omitted sending crucial consumption entries that outside counsel required to determine the amount of duty owed. During this time Ms. Crecco was providing internal Hitachi America documents to Customs investigators. In June 1988, outside counsel advised that MVA and EPA were potentially reportable to Customs but counseled against disclosure until the dutiability of MVA and the amount were determined. In late June, the General Counsel of Hitachi America became involved and requested payment details from CIA which were not forthcoming. Hitachi officials testified that in a meeting with CIA officials CIA indicated it wanted to steer clear of the problems and "let sleeping babies lie." CIA never provided the payment details and the government obtained them in a future search and seizure effort of CIA offices.

The last MARTA entry occurred on June 29, 1988, roughly a month after Hitachi America had retained outside counsel to deal with the duty issues. The Court finds that during Mr. Hisada's tenure, Hitachi America failed to exercise reasonable care to declare EPA payments until outside counsel was in fact brought in. This has no impact on the penalty base because the entry documents were inherently inaccurate in their own right as discussed above.

Ms. Crecco resigned from Hitachi America in July 1988, one year after Mr. Long resigned. In November 1988, Ms. Crecco arranged a lunch with Ms. Hansen and she (Crecco) secretly recorded the conversation on tape at the request of Customs. Ms. Hansen revealed to Ms. Crecco that Hitachi America was still addressing the duty issues and that the "factory [i.e., Hitachi Japan] was ready to pay." In December 1988, Hitachi Japan informed Hitachi Amemoney needed to pay additional duties. In early 1989, outside counsel was attempting to calculate the duty owed by reference to the amount of money MARTA paid CIA since CIA was not forthcoming on what it remitted abroad. On April 4, 1989, before

that amount was determined, the government executed a search warrant on Hitachi America. Two months later Mr. Long called the *Wall Street Journal* to announce the raid to the public. In his conversation with the newspaper, Mr. Long testified that he relayed facts he had gleaned during his employment as in-house counsel with Hitachi America. He had also relayed confidential information to Customs investigators in the fall of 1988. A grand jury was convened but, significantly, failed to indict for criminal fraud. In August 1991, before which time she had married Mr. Long, Ms. Crecco collected approximately \$213,000 from the government as a moiety for her efforts. She signed a form when she collected the moiety on which form she acknowledged that the sum was taxable income. During their depositions in January 1996, the government learned that she and her husband had failed to declare that sum on their 1992 income taxes. On cross-examination, Mr. Long testified that in April 1992 they decided not to declare the moiety as income.

The conduct of the Longs entirely impeached their credibility as witnesses. Ms. Long was apparently stalling Hitachi America in its effort to resolve the duty issues at a time when she was in charge of customs compliance and she represented to Customs' Office of Investigations that Hitachi America officials intended not to pay duty when she knew that they were attempting to resolve the issues. Mr. Long may have breached his duty as a lawyer not to reveal confidential information to outside sources and appeared very uncomfortable on the witness stand. The pair also failed to pay taxes they knew they owed. Although the Longs' testimony cast aspersions on the integrity of many Hitachi officials and their intent to comply with customs laws, the Court finds neither of them credible. The facts even permit an inference that venality drove a mutual scheme to set Hitachi America up for illegal conduct.

Despite Ms. Crecco's inherent conflict of interest, the Court will not grant defendants' request that Ms. Crecco's letter to Customs be deemed a prior disclosure. The facts of the case will allow a court to determine whether the compliance official effected the violation, and the facts of this case show that she did not have the authority to compel compliance but only to monitor it; the managers of the MARTA project were aware of the problem and in control of the issue. For the purposes of the negligence analysis, the Court will not entertain an adverse inference arising from the government's egregious destruction of the pre-importation files that Customs approved Hitachi America's course of conduct, nevertheless the Court views with grave disapprobation such reckless conduct. Finally, Hitachi America did not show reasonable care by describing past projects where they waited for Customs to request information about EPA payments: absent depositing estimated duties or arranging for suspended liquidation, the duty to report EPA at once is an affirmative one. Before closing this section, the Court notes that Hitachi America's interest in retaining the funds until the end of the project was minimal, other than its pure self-interest in the time value of money, and "[i]t is fundamental that the standard of conduct which is

the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, against the value of the interest which the actor is seeking to protect * * *." *Prosser on the Law of Torts*, § 32, at 149 (4th ed. 1971). The social interest in compliance with laws, including customs laws, is paramount, and the utility of Hitachi America's conduct was minimal.

II. HITACHI AMERICA DID NOT COMMIT FRAUD

The government alleged that Hitachi America committed fraud from the incipience of the importations in June 1984 throughout May 1987, a period comprising twenty entries. For claims alleging fraud, "[T]he United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence." § 1592(e)(2). "Although not susceptible to precise definition, 'clear and convincing' evidence has been described as evidence which produces in the mind of the trier of fact 'an abiding conviction that the truth of [the] factual contentions are 'highly probable.'"" *Buildex Inc. v. Kason Industries, Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)). In order to demonstrate that Hitachi America committed fraud, the government bore all the burdens of proof. The government failed to show by clear and convincing evidence that defendants intended to defraud the revenue or otherwise violate the laws of the United States. Accordingly, when Hitachi America joined Hitachi Japan's motion for dismissal pursuant to CIT Rules 41(c) and 52(c) upon the close of the government's case in chief, the Court granted their motion with respect to fraud.

For the purposes of this case, CIT Rules 41(c) and 52(c) are equivalent grounds for defendants' motions. CIT Rule 41(c) declares:

Insufficiency of Evidence. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant * * * may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff * * *. If the court renders judgment on the merits against the plaintiff, the judgment shall be supported by either a statement of findings of fact and conclusions of law or an opinion stating the reasons and facts upon which the judgment is based. A dismissal under this subdivision (c) operates as a dismissal upon the merits, unless the court otherwise directs.

Id. (emphasis added). CIT Rule 52(c) declares:

Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter a judgment as a matter of law against that party with respect to a claim or defense that under the controlling law cannot be maintained or defeated without a favorable finding on that issue * * *. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Id. The analogous provision to current CIT Rule 41(c) was included in former Rule 41(b) of the Federal Rules of Civil Procedure ("FRCP"). The 1991 amendments to the FRCP transplanted the "insufficiency of plaintiff's evidence" ground from FRCP Rule 41(b) into FRCP Rule 52(c): "A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c)." FRCP Rule 41 advisory committee's notes (1991 amendment). The Court of International Trade adopted the 1991 FRCP amendments into CIT Rule 52(c) but left CIT Rule 41(c) unchanged. This accounts for the substantial overlap between the purviews of CIT Rules 41(c) and 52(c) and renders them alternative and equivalent grounds upon which a defendant may motion the Court for findings on the merits at the close of a plaintiff's case in chief. Although the Court acts pursuant to both applicable CIT Rules, the Court chooses to articulate its reasoning in opinion form as provided for under CIT Rule 41(c) rather than to make discrete findings of fact and conclusions of law pursuant to CIT Rule 52(c).⁶ This Court has historically provided the opinion form as the avenue to address a CIT Rule 41(c) motion.

The cogitative process by which the Court decides CIT Rule 41(c) motions is described in jurisprudence developed under the analogous provision formerly contained in FRCP Rule 41(b). The Court of Appeals for the Federal Circuit explained the judge's role in addressing a motion to dismiss under former FRCP 41(b) based on the failure of plaintiff's evidence:

[T]he trial judge in deciding such a motion in a nonjury case may pass on conflicts of evidence and credibility * * *. The trial judge * * * may weigh and consider the evidence and sustain defendant's motion even though plaintiff's evidence establishes a *prima facie* case that would preclude a directed verdict for defendant in a jury case. Even assuming [plaintiff] had established a *prima facie* case on the merits, that would not preclude entry of judgment * * *. The district court must also look to the evidence elicited contrary to plaintiff's position [and] evaluate and resolve conflicts in the evidence * * *.

Stearns v. Beckman Instruments, Inc., 737 F.2d 1565, 1568 (Fed. Cir. 1984) (citations omitted); *accord Hersch v. United States*, 719 F.2d 873, 876 (6th Cir. 1983); *Sanders v. General Serv. Admin.*, 707 F.2d 969 (7th Cir. 1983) (citations omitted); 9 Wright & Miller, *Federal Practice and Procedure* § 2573.1 at 497-99 (1995). In short, when deciding a CIT Rule 41(c) motion, the judge presiding at the bench trial must unfurl the plentitude of his discretionary powers and decide whether the plaintiff sustained its burden of proof before it allowed the curtain to fall on its case in chief. The Court appraises the credibility of witnesses and weighs all the evidence presented during the plaintiff's opening act, including

⁶ At the close of trial, the government attempted to serve a set of interrogatories on the Court. This misapprehension of counsel's role *vis a vis* the Court was rejected.

evidence elicited contrary to plaintiff's position. Before granting the partial dismissal in this case, the Court made credibility determinations and weighed all the testimony presented as well as the documentary evidence received during the plaintiff's case in chief. Since defendants elected not to put on a case, the Court possessed just as much information when it rendered a decision on the merits under CIT Rule 41(c) as it did after the close of trial.

As an initial matter, defendants argue at length that the Court may not retrospectively apply the 1989 revised Customs definition of "fraud" to this case. When the alleged offenses were committed between March 1984 and June 1987, it was Customs' view that under § 1592, fraud "resulted from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States * * *." 19 C.F.R. Part 171, App.B(B)(3) (1988) (emphasis added). Customs revised the regulation to read that a violation is "fraudulent if the material false statement or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally * * *." 19 C.F.R. Part 171, App.(B)(B)(3) (1989). The supposed problem with applying the revised regulation is that the 1989 "ex post facto definition dispenses with any requirement that the defendant intentionally acted to defraud Customs of revenue." Defs.' Pre-Trial Br. at 33. However, the former regulation relied upon by defendants itself died to contain such a requirement because § 1592 proclaims that liability for fraud may arise "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby * * *."

Directly on point is *United States v. Modes, Inc.*, 16 CIT 879, 804 F.Supp. 360 (1992) ("*Modes I*"), where the Court ruled that an intent to defraud the revenue was not a necessary element of a § 1592 fraud case under the former unrevised regulation.⁷ In order to aid in the foreign seller's evasion of Taiwanese taxes, the defendants in *Modes I* intentionally engaged in a double invoicing scheme in connection with duty-free merchandise imported into the United States pursuant to the General System of Preferences. The Court found that the defendants successfully negated allegations of an intent to defraud the revenue, but held that the defendants nevertheless were liable for fraud because they intentionally violated customs laws when they submitted false invoices. *Id.* at 883, 804 F.Supp. at 365. The Court has previously recognized that under the former regulation, customs fraud could be premised upon the intentional violation of any customs statute. In *Modes I*, Judge Newman seized upon the broad grasp of the regulatory language to rule:

"Defendants' contention that they did not know that their false invoices would defraud the Government of revenues is not dispositive

⁷ It is true that judges on the Court of International Trade are not bound by each other's decisions. *Algoma Steel Corp., Ltd. v. United States*, 7 Fed. Cir. (T) 154, 156, 865 F.2d 240, 243 (1989) ("among trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere. That is not done here; with all the criticism directed by appellants towards Judge Restani for not following Judge Newman, nowhere is anything pointed out saying she must"). Although not binding, Judge Newman's sage decisions in the *Modes* cases are highly persuasive to this Court.

of whether defendants intended to violate U.S. law within the meaning of the [pre-1989 fraud] regulation * * *. [Defendant's] critical and unqualified admission in his deposition that he knew that the double invoicing scheme was not 'legal' is dispositive of his liability for fraud under § 1592 pursuant to the second broad formulation for fraudulent intent under the regulation"

Modes I at 883, 804 F.Supp. at 365 (footnote omitted). The Court agrees that § 1592 as correctly interpreted by the unrevised regulation imposes liability for intentional violations of import laws regardless of any intention to deprive the government of lawful duties. Therefore, in order to prevail on its fraud claim against Hitachi America, the government needed to show merely that Hitachi America knowingly violated § 1484 or § 1485. Of course, the government could also prove fraud by showing an intent to defraud the revenue and attempted to do so.

A. The Government Did Not Prove That Hitachi America Intended To Deprive The Revenue:

The government describes a byzantine conspiracy to defraud the revenue of the United States. While the Court holds both Hitachi corporations to have been negligent in the conduct of Hitachi America's importations, their reference, more than ninety times on entry documents, to the underlying contract containing the escalation provision simply does not comport as a matter of fact, with an intention to defraud. Further, the pre-importation meeting with the Import Specialist in the principal port of importation—and the government's suspicious destruction of the records of that meeting—at which meeting the contract must have been discussed (otherwise, why the meeting?) added to the numerous internal memoranda indicating an interest in finalizing the importers Customs obligation do not comport with an intention to commit fraud and thoroughly negate the recklessness requisite to a finding of gross negligence.

Mr. Yamasaki, the Hitachi Japan official who calculated all the figures associated with the MARTA project, always included EPA and MVA duty estimates in his initial allocations for Hitachi America's budget. Later, in 1984, Mr. Yamasaki learned that in other long-term projects, EPA had not been listed on the commercial invoices or reported to Customs without adverse consequence; thus, he informed other Hitachi Japan officials to arrange for the return of funds that had originally been budgeted to Hitachi America for escalation payments. The following correspondence, claims the government is their best evidence for an intent to defraud the revenue: Hitachi Japan officials sent a telex to Mr. Toda on February 28, 1984:

[S]ince it was as follows in the Ludington hydraulic turbine case which was handled five years ago, we would like you to investigate the present state of affairs.

(1) Under the U.S. regulations of that time, in cases where the contract between customer and supplier clearly stated that duties also apply to the escalation, additional levies were to be made (that is, at

the time of shipping the original amount is listed and *later on the escalation portion is reported as well*).

(2) In the Ludington case, this was not explicitly stated in the contract, so the original contract price was invoiced. No problems occurred afterwards.

(emphasis added). Mr. Toda responded on March 9:

According to U.S. Customs regulations, in a contract with EPA, even if it is not expressly stated in the contract that the escalation portion is dutiable, *it is subject to duty*.

Heretofore at Hitachi America, with regard to this point, the work has not been performed strictly. In Power contracts also, the actual practice seems to have been that the commercial invoice was drafted using the PO (base price) at the time of shipping, and that the escalation portion was not declared.

In the MARTA contract, the final price is not yet available at the time of importation, and Hitachi America Legal [Department] is presently studying how we should handle the commercial invoice.

(emphasis added). Hitachi Japan replied the next day:

In the process of confirming whether the customs invoice should be issued with a correction for the escalation portion, or whether it is okay to use the base price.

Because the assessment of the duty payment amount of [Hitachi America] includes the EPA, MVA adjustment amount, if it is okay to use the base price, it is necessary to negotiate the return to Hitachi [Japan] of the difference between the actual payment amount and the assessed amount.

In its Pre-trial Brief, the government declared that this final communication "articulates the motives of [Hitachi Japan] more succinctly than any other document * * *." *Id.* at 20. This communication, offered to the Court as the documentary centerpiece of the government's fraud scenario, falls far from constituting clear and convincing evidence of an intent to defraud the revenue. Although it could possibly be consistent with a matrix of an intent to defraud, the Court will not engage in the wild speculation urged by the government. The document is entirely consistent with an intent to pay at the end of the project, and the series of correspondence explicitly includes a statement that escalation payments are reported at a later date. The main subject of the discussions is how to deal with the invoice. It would not be unreasonable for the parent company to seek repatriation of duty budget in 1984 if it believed that EPA duty was payable at the end of the decade. The government's belief that this communication was a camouflaged directive in furtherance of a scheme to defraud the revenue is mere conjecture. Less than a month after this exchange, Mr. Toda received Ms. Crecco's memo stating that estimated duties should be deposited on EPA or liquidation held open under customs laws. Mr. Toda did not remember why he changed his mind and no evidence illuminates his motivations.

The government's second highly touted document bears notes taken down by a Hitachi Japan employee, Mr. Kikuchi, regarding a telephone

call he had with Mr. Yamasaki. The government explains that Mr. Kikuchi, new to the MARTA project, was to relay this information to his superior, who was also unfamiliar with the project. The notes read:

Kasado bears the import duty in the end.

Because the steps are

CIA to	[Hitachi America] to	Kasado
(1) payment on behalf	(2) invoicing	(3) invoicing

This initially belonged to the [Hitachi America] scope, but the surplus due to the savings on duty from the declaration is Kasado's

Mr. Yamasaki testified that this discussion revolved around duty exemption for U.S. parts shipped to Japan and then reimported in the assembled subway cars. Mr. Kikuchi could not remember the circumstances surrounding his notes. Again, although the statement about duty saving could be consistent with an intent to defraud, it is not the kind of highly probable material that gives rise to clear and convincing evidence.

There are other circumstances tending to negate an intent to defraud the revenue. The MARTA contract was a public contract and a press release announced that MARTA had included an estimated \$3.7 million dollars in EPA payments during the course of the project. Hitachi America listed the underlying contract, "CQ-311", ninety-two times on the entry documents. The Court entertains an inference that the document was in the possession of the Savannah Import Specialists, a piece of information they routinely request for long-term multiple-entry projects; moreover, because of the outlandish destruction of the files after the government commenced its investigation, the Court entertains an adverse inference that the Import Specialists were apprised of the escalation clauses. Although not part of the period in which the government alleged fraudulent conduct, Hitachi America's behavior in the final years of the project manifests an intent to pay EPA duty, and that bears on its state of mind in the earlier years of the project. The evidence before the Court shows that the allegation of an intent to defraud the revenue is not proven.

B. The Government Did Not Prove That Hitachi America Intended To Violate Customs Laws:

The question remains whether Hitachi America committed fraud by knowingly violating customs laws even if it did not intend to defraud the revenue. The government failed to prove its case. At the outset, it hardly bears explanation that the government failed to prove Hitachi America knowingly violated the law by means of the dollar denominations on the invoice. First, the government argued the dollar transaction theory so it never alleged or argued that Hitachi America knew the transaction was in yen; concomitantly, it never alleged or argued that the dollar denominations were materially false because they understated the value of yen sent abroad. True enough, Ms. Hansen's provocative statement in her

February, 1988 memo that "[s]ome people feel * * * the way money is transferred back to Japan, makes MVA dutiable" is some evidence that Hitachi America actually knew yen were being remitted by CIA. But standing alone, it is quite distant from clear and convincing evidence.

There was one question during the course of litigation that reared repeatedly: where were CIA and CIJ? Why were they not joined by the government in this action? For unknown reasons, the government has chosen to proceed in a separate action—if at all—against those two parties. It is now accepted by all the parties that CIA sent a fixed amount of yen to CIJ regardless of MARTA's MVA payments; but CIA's recalcitrance in providing Hitachi America with payment records shows that CIA was particularly secretive about who assumed the risk of currency fluctuation between it and its parent. This suggests that Hitachi America in fact did not know the amount of yen being remitted abroad. Because government counsel rebuffed the views of its client, Customs, its theory of the case was incompatible with what it needed to prove on this issue. CIA and CIJ appear to be highly appropriate, if not essential, parties defendant to this action, rather than the subject of a separate suit.

With regard to EPA, the government relies emphatically on two "hot" documents which the Court finds rather tepid. With respect to the Toda period, the government argues that Ms. Crecco's 1984 memo imprinted him with the knowledge that in order to escape the requirement of paying duty at once on EPA receipts, he had to arrange for suspended liquidation or deposit estimated duties. There are critical flaws in this argument. First, government counsel itself elicited testimony from Ms. Crecco that Mr. Toda's English was very poor at the time she wrote that memo. Second and more important, advice from a lay employee who had recently ascended from a clerical position does not constitute an authoritative interpretation of law. An expert's advice does not even constitute an authoritative interpretation of law. Cf. *Gates & Fox v. OSHRC*, 790 F.2d 154, 156-157 (D.C. Cir. 1986) (Scalia, J.) (company not on notice of regulatory requirement by virtue of expert interpretation); *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (informal advice from agency employee to cease a questionable practice does not "indicate that the agency considered the practice a violation of the Rule"). Ms. Crecco's memo is evidence that Mr. Toda should have looked further into the matter, but it did not serve to invest him with actual knowledge. This same argument applies to the government's second "hot" document, the memo Ms. Hansen wrote to Mr. Taga. All Hitachi employees testified that they never came to doubt the permissibility of paying EPA at the end, and though the memos from lay employees are circumstances which should have alerted the MARTA overseers to their duty to pay on EPA at once, actual knowledge of a violation has not been demonstrated by clear and convincing evidence. Compare other cases where the Court has found fraud. *United States v. Thorson Chem. Corp.*, 16 CIT 441, 795 F.Supp. 1190 (1992) (defendant admitted that it used double and sometimes triple invoicing scheme); *United States v. Modes*, 16 CIT 879, 804

F.Supp. 360 (1992) (defendant admitted to double invoicing); *United States v. Daewoo Int'l (Amer.) Corp.*, 12 CIT 889, 696 F.Supp. 1534 (1988) (prior guilty plea to false statements).

The record of this case demonstrates that it was in 1991, two years after the criminal investigation and during the pendency of this civil litigation when the government destroyed potentially exculpatory information contained in both the Savannah District's and the National Import Specialist's files, in violation of its own written policy. The government's retention policy required the retention of documents "directly pertinent to litigation." See U.S. Customs, *Records Control Handbook* (1982) at 3. See also U.S. Customs, *Records Control Handbook* (1990) at II-3 (records may be destroyed if they have no legal value). The Court is taken aback by this conduct and under the facts of this case would be inclined to deny the fraud count based on this circumstance alone.

III. HITACHI AMERICA DID NOT COMMIT GROSS NEGLIGENCE

For gross negligence claims, "[T]he United States shall have the burden of proof to establish all the elements of the alleged violation." § 1592 (e)(3). "The gross negligence standard has been defined as requiring willful, wanton, or reckless misconduct, or evidence of 'utter lack of all care.'" *Machinery Corp. Of Amer. v. Gullfiber AB*, 774 F.2d 467, 473 (Fed. Cir. 1985) (quoting Prosser and Keeton, *The Law of Torts*, § 34 (4th ed. 1984)). Customs' regulation reads: "A violation is determined to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard of the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. pt. 171 App.B(B)(2). The Court will hold a defendant liable for a grossly negligent violation of § 1592 if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts *and* the statutory obligation.

Once again, the government bore the burden to show that Hitachi America was at fault for not ascertaining that yen was being remitted abroad, and this it neither alleged nor attempted to prove. When the burden is on the defendant to show it exercised reasonable care, an argument that it was cut out of the information loop by its very own partner will not suffice when the basic facts show a violation of law. Under the gross negligence standard, the government bears the burden to show that the defendant was willful or wanton and that evidence is simply not before the Court. Moreover, it would be a mockery to hold that Hitachi America was grossly negligent by failing to ascertain that it had to report the yen sent abroad when the Justice Department insists that the transaction was in dollars even though it—and not Hitachi America—possesses all the payment information from CIA's records detailing the yen remittances.

With regard to the failure to report EPA receipts, the case is closer but the Court cannot say that Hitachi America recklessly disregarded its obligation to pay EPA duty at once. The documents in evidence display an initial belief by Hitachi officials that it was permissible to pay aggregate

EPA duty at the end of a long term project. All of the Hitachi officials who testified at trial asserted their belief that it was permissible. Although the testimony was self-serving, the Court gives it some weight. Disregarded advice from lay employees does not entail recklessness, though disregarded advice from experts or legal counsel might satisfy the test. In fact, however, when defendants' consulted legal counsel, they were advised NOT to pay until final amounts were ascertained. Government counsel frequently erupted into testimony that it is common knowledge in the import community that importers may not privately run a tally on EPA and announce with impunity the aggregate duty at the end, but the government failed to call a *single* Import Specialist to testify to that common knowledge. The duty to pay at once on EPA receipts absent suspended liquidation or the deposit of estimated duties, while undeniably extant, apparently is not blatant. If it were, the Court would have seen an expert within the customs community testify on the government's behalf. Finally, the Court entertains the adverse inference that exculpatory evidence may have been contained in Customs files, and the Court must not condone unconscionable government conduct to the extent available under the gross negligence standard when a defendant may have been deprived of vindicating facts.

IV. HITACHI JAPAN IS LIABLE FOR AIDING OR ABETTING HITACHI AMERICA'S NEGLIGENCE

Hitachi Japan argues that a party cannot be liable for aiding or abetting another's negligence. Hitachi Japan asserts, "Aiding and abetting is, by its terms, an intent-based concept * * *. The government would have to prove a paradoxical set of facts—that [Hitachi Japan] *knew* that Hitachi America was committing negligence, and then intentionally assisted in Hitachi America's alleged negligence—in order to prove aiding and abetting negligence." Hitachi Japan's Post-Trial Br. at 12.⁸ Indeed, some Courts have ruled that there can be no action based on the aiding and abetting of civil negligence. See *In Re American Continental Corp.*, 794 F.Supp. 1424, 1439 (D.Ariz. 1992) (refusing to recognize action for aiding and abetting civil negligence); cf. *Rogers v. Furlow*, 699 F.Supp. 672, 675 (N.D.Ill. 1988) (claim of conspiracy to commit civil negligence called "a paradox at best"); *Koehler v. Pulvers*, 606 F.Supp. 164, 173 (S.D.Cal. 1985) ("The allegation of civil conspiracy appears inherently inconsistent with the allegation of an underlying act of negligence"). Nevertheless, a court should "give effect, if possible, to every clause and word of a statute," (*United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)), and in the instant case the Court draws on the common law to give effect to the cause of action Congress intended to create. There is ample common law doctrine informing the meaning of the statutory term and the Court rules that there exists a cause of action under § 1592 for aiding or abetting a negligent violation of the customs laws.

⁸ It is important to keep in mind that conspiracy is different from a charge of aiding or abetting because conspiracy requires an agreement among tortfeasors to accomplish the tortious end.

The Court's use of common law doctrine to flesh out statutory language is appropriate. "When Congress borrows a common law term in a statute, absent a contrary instruction, it is presumed to adopt the term's widely accepted common law meaning." *Mars, Inc., v. Kabushiki-Kaisha Nippon Conlux*, 12 Fed. Cir. (T) _____, 24 F.3d 1368, 1372-73 (1994). "[T]he applicability of common law doctrines in litigation under federal statutes depends on whether those principles advance the goals of the particular federal statute which plaintiffs allege has been violated." *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1356 (3d Cir. 1987), (citing *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982)). The goal of the statute was to create aiding or abetting liability for any underlying violation of the penalty statute; drawing on accepted common law meaning to inform that statutory cause of action is useful in effecting that goal. At the outset the Court emphasizes that § 1592(a)(1)(B) creates a cause of action for aiding or abetting, not for aiding and abetting. According to *Black's Law Dictionary*, "to abet" means "[t]o encourage, incite, or set another on to commit a crime." *Black's Law Dictionary* 5 (6th ed. 1990) "To aid" means "[t]o support, help, assist, or strengthen. Act in cooperation with; supplement the efforts of others." *Id.* at 68. To aid therefore involves mere assistance rather than the encouragement or advocacy requisite to abet. Although the following exegesis of relevant law deals with the tort of aiding and abetting, a defendant may be liable under § 1592(a)(1)(B) so long as it assisted or supported another's negligence even if it did not encourage it.

Several jurisdictions have recognized a common law action for aiding and abetting negligence. *See, e.g., RTC v. Farmer*, 823 F.Supp. 302, 309 (E.D. Penn. 1993); *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (vicarious liability could arise where defendant "substantially aid[ed] negligent action"); *Winslow v. Brown*, 371 N.W.2d 417, 421-22 (Wis. Ct. App. 1985) ("we conclude that a person may aid and abet a negligent tort"); *Lindsay v. Lockwood*, 625 N.Y.S.2d 393, 397 (Sup. Ct. 1994); *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220, 1232 (Kan. 1991); *American Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 625-26 (Kan. 1968); *Price v. Halstead*, 355 S.E.2d 380, 386 (W. Va. 1987); *Cobb v. Indian Springs, Inc.*, 522 S.W.2d 383, 388-89 (Ark. 1975). These cases uniformly rely upon § 876(b) of the Restatement (Second) of Torts ("Restatement § 876(b)") to establish and articulate the elements of a cause of action for aiding and abetting. Although it is rare for the text of a Restatement to attain authoritative status, in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177 (1994), the Supreme Court wrote, "To be sure, aiding and abetting a wrongdoer ought to be actionable in certain circumstances. Cf. *Restatement (Second) of Torts § 876(b)* (1977)." *Id.* (emphasis added). The Supreme Court proceeded to discuss how some state jurisdictions have adopted the tort of aiding and abetting as described in Restatement § 876(b) and others have declined to do so. *Id.* at 181-182. Regardless of state law, "Congress knew how to

impose aiding and abetting liability when it chose to do so." *Id.* at 176. Congress expressly intended to create a cause of action for aiding or abetting a negligent violation of the customs penalty statute, and the Court leverages the language of Restatement § 876(b) and other courts' interpretations of that language in order to animate the Congressional intent manifested in § 1592(a)(1)(B).

The leading authority on what constitutes the tort of aiding and abetting appears in Restatement § 876(b):

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he * * * (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself * * *.

Id. Comment d to Restatement § 876(b) states:

If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. This is true both when the act done is an intended trespass * * * and when it is merely a negligent act * * *.

The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered.

Id. cmt. d (emphasis added). Restatement § 876(b) Comment d expressly includes negligence among the underlying torts which can give rise to vicarious liability under an aiding or abetting theory. Since the standard of conduct by which negligence is determined is an objective one, liability for negligence abstracts from the defendant's actual state of mind and looks to what a reasonable person would have done under the circumstances. It would be absurd to condition aiding or abetting liability upon actual knowledge of the underlying tort when the principal tortfeasor might not have discerned the foreseeable risk of harm. Consequently, the condition in Restatement § 876(b) to the effect that a defendant must "know[] that the other's conduct constitutes a breach of duty" means that an aider or abettor of negligence should have known that the underlying tort was being committed. It is also particularly appropriate to find that negligence satisfies the condition of "knowing" when, as here, the statute creates liability for aiding or assisting regardless of any abetting or encouragement. Furthermore, although none of the relevant cases from the civil arena expounds on the basis of liability for aiding or abetting negligence, in the criminal arena "[t]he state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal offense." *United States v. Valencia*, 970 F.2d 671, 680 (7th Cir. 1990). The Court rules that negligence is a basis of liability for aiding or abetting a negligent violation of the Customs penalty statute.

Based on Restatement § 876(b), courts have determined that the tort of aiding and abetting involves three elements: "(1) the party whom the defendant aids must perform a wrongful act that causes injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the *See, e.g., Halberstam*, 705 F.2d at 477; *accord, e.g., State ex rel. Mays*, 811 P.2d at 1232; *Lindsay*, 625 N.Y.S.2d at 397; *RTC v. Farmer*, 823 F.Supp. at 309. "By definition, then, the act rendered unlawful under an aiding and abetting theory is different than the act rendered unlawful by the underlying tort." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1430 (3d Cir. 1994). Accordingly, Hitachi Japan will be held liable if it substantially assisted Hitachi America's conduct but failed to exercise reasonable care to determine whether Hitachi America's conduct was negligent and thus tortious. This formulation of the tort possesses the dual virtue of resolving the patent ambiguity contained in the second element of the offense while simultaneously honoring the burden-shifting mandate of § 1592(e)(4). That is, by requiring that a defendant "be generally aware of his role as part of an overall illegal or tortious activity", the second element of the tort could mean that the defendant must be either generally aware of its actions or generally aware that the underlying tort is being committed. The former interpretation would make the second element of the tort's formula redundant with the third, for substantial assistance involves significant and intentional role playing. The latter interpretation, embraced by the Court, assimilates general awareness to breach; thus, it is the defendant's burden to show that it exercised reasonable care in ascertaining whether it was substantially assisting illegal conduct. The general notion the tort reflects is that once a party has become enmeshed in another's conduct by encouragement or assistance, it opens itself to liability for that conduct. Once the government proved both a violation of customs laws and Hitachi Japan's substantial assistance in that violation, it became Hitachi Japan's burden to show that it exercised reasonable care to ensure that Hitachi America's conduct complied with the law.

Under the substantial assistance prong of the tort, the Court will look to six factors to determine whether Hitachi Japan extended substantial assistance to Hitachi America. Five of those factors are enumerated in Restatement § 876(b) Comment *d*: the nature of the act the defendant assisted or encouraged, the amount of assistance the defendant provided, the defendant's presence during the act, the relationship between the defendant and the principal tortfeasor, and the defendant's state of mind. Restatement § 876(b) cmt. *d*. In addition to these factors, some courts have added a sixth: the duration of the assistance provided. "The length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind. *Halberstam*, 705 F.2d at 484; *accord State ex rel. Mays*, 811 P.2d at 1232. The Court is

mindful that incidental participants such as freight forwarders and customs brokers must not be swept within the ambit of aiding or abetting liability and thereby treated as insurers of their customers. The tort of aiding or abetting must be "designed to insure that innocent, incidental participants in transactions later found to be illegal are not subject to harsh, civil, criminal, or administrative penalties." *Investors Research Corp. v. SEC*, 628 F.2d 168, 177, (D.C. Cir. 1980). The Court is convinced that the penetrating six factor substantial assistance analysis will shield innocent parties from torts they did not foment.

Hitachi America ran afoul of customs laws so the first prong of the aiding or abetting tort is satisfied. The Court now turns to the substantial assistance test. The nature of the act was simple negligence, so the Court must carefully guard against strict liability. Hitachi Japan provided a tremendous amount of assistance to Hitachi America in its importing activities. Hitachi Japan negotiated the contract with MARTA without Hitachi America's involvement. Hitachi Japan constantly conferred with Hitachi America over the contents of the entry documents. Hitachi Japan allocated duty budget to Hitachi America so that Hitachi America could cover its duty liability, proving that Hitachi America was earning a nominal sum on the deal. The configuration of the transaction and the role of Hitachi America in it was dictated from Japan. There was continuous correspondence between the two over the transactional issues relevant to entry documents and duty payments, and Hitachi Japan advised Hitachi America to conduct its own legal investigation into the MARTA customs issues.

The next relevant factor is the parties' relationship, which is that of parent and wholly owned subsidiary. This was a very close working relationship. Hitachi Japan officials were sent to Hitachi America to direct the MARTA project and were rotated back to Hitachi Japan with full knowledge of all the issues. Hitachi America, according to Ms. Hansen's testimony, struggled to build a consensus among Hitachi Japan officials that outside counsel should be retained to resolve the problems. This relationship partly plays into the next factor, Hitachi Japan's state of mind. All Hitachi Japan officials who testified stated that they knew EPA was dutiable, and they knew there were associated disclosure and reporting obligations. They were fully aware of potential invoicing and reporting pitfalls. Finally, the duration of the assistance spanned nearly a decade. The factors lead unswervingly to the conclusion that Hitachi Japan provided Hitachi America with substantial assistance with regard to both the invoicing and the reporting issues. Hitachi Japan substantially assisted Hitachi America in its course of conduct.

Hitachi Japan failed to prove that it acted with reasonable care to ascertain whether Hitachi America should list yen on the entry documents and whether Hitachi America should report EPA payments when received. Hitachi Japan was receiving yen from CIJ and Hitachi Japan has not argued that it made any efforts whatsoever to ascertain whether CIA was likewise remitting yen to CIJ. Hitachi Japan has not argued

that it made any such inquiries. No doubt it had some bargaining power with the co-owner of its joint venture to gather that information. Mere protestations of lack of knowledge do not prove reasonable care. Second, Hitachi Japan sought to repatriate funds it initially had allocated to Hitachi America for EPA duty payments based on the incorrect belief that it was permissible to pay EPA duty at the end of the project without making prior specific arrangements with Customs. In one correspondence Hitachi Japan expressed an intention to conduct an independent legal examination of the duty issues but there is no evidence that it did so. Hitachi America also had to build the consensus within Hitachi Japan that there might be a problem, which suggests some inertia in resolving the customs issues.

Hitachi Japan argues that it exercised reasonable care by allocating EPA duty budget, by seeking advice on disclosure and reporting obligations, and by supporting Hitachi America's efforts to calculate and tender EPA duty toward the end of the project. The Court is not persuaded that this rose to the level of reasonable care. Although it is true that Hitachi Japan allocated duty budget, it is also apparent that it sought to repatriate duty budget that it incorrectly assumed would not be required until the end of the project. Moreover, Ms. Hansen's testimony persuades the Court that even though duty had been allocated on paper, there was some reluctance by Hitachi Japan to permit the actual expenditure of that budget. With regard to seeking advice, the evidence suggests that Hitachi Japan was leading Hitachi America into the conclusion that it was permissible to pay EPA at the end based on the elusive past practice. Hitachi Japan never urged Hitachi America to explore the issues with counsel. Although Mr. Toda sought and received advice from Ms. Crecco regarding suspending liquidation and depositing estimated duties, Mr. Toda reversed the decision he communicated to Hitachi America; there is no evidence that Hitachi Japan sought assurances that his decision conformed law. Hitachi Japan's support near the end of the project for Hitachi America's efforts to calculate duty owed on EPA do not prove that Hitachi America acted reasonably with respect to the duty to pay EPA at once; rather, this was purely a remedial measure that was taken at the end of the project when the violations had already occurred.

V. CALCULATING THE AMOUNT OF PENALTY

A. *The Loss of Revenue Must Be Calculated Based On The Sums Paid By MARTA:*

The government maintains that defendants are estopped from arguing the correct valuation because they did not protest the appraisals of any MARTA entry:

Hitachi America's right to protest the appraisal of a MARTA entry (based upon an argument that the appraisal was performed upon the wrong sales transaction) expired 90 days after the liquidation of each entry. 19 U.S.C. § 1514(a)(c). Neither Hitachi America nor Hitachi [Japan] ever filed a protest of the appraisal of any MARTA

entry. Accordingly, the Customs Service's decision to use the transaction reported on the entry (*i.e.*, the sale from CIJ to Hitachi America) as the basis for appraisal became "final and conclusive upon all persons" 90 days after the liquidation of such entry."

Pl.'s Post-Trial Br. at 25-26 (footnotes and citations omitted). However, the Court is in accord with a former holding directly on point:

The Court is aware of the fact that defendant is banned from instituting an action against Customs concerning the classification and valuation as prescribed by 19 U.S.C. § 1514. However, defendant, in defending an action instituted under 19 U.S.C. § 1592, may solely, as defense against the penalty sought, establish the correct valuation and classification.

United States v. Zuber, 9 CIT 511, 512 (1985). Thus, defendants were entitled to challenge both the methodology employed by the government to determine the amount allegedly owed, and, if negotiated, applicable penalties.

The determination of lost revenue is governed by the valuation statute, § 1401a. The preferred basis for arriving at the proper valuation is the "transaction value", defined as "the price actually paid or payable" by the importer to the seller, which in this case would be the price paid by the joint venture to CIJ. § 1401a(b)(1). In its Reply to Defendants' Pre-Trial Brief, the government "contend[ed] that the preferred method of appraisal is by reference to the price paid by the importer (Hitachi America) [to CIJ]." Pl.'s Reply to Defs.' Pre-Trial Br. at 5. Notwithstanding this representation and to the surprise of the Court, the government's expert auditor, Mr. Donohue, testified to the value of the dollar payments from MARTA to the joint venture. Mr. Donohue testified that based on the total EPA and MVA dollar amounts paid by MARTA to the joint venture, the loss of revenue equaled \$947,854. Mr. Donohue explained that this calculation of lost duties was \$96,399 greater than the \$851,455 figure contained in the Pre-Penalty Notice because various escalation payments made in connection with final contract modifications were not included in the initial audit; a supplemental audit produced the additional \$96,399. In its Post-Trial Brief, the government argues that \$947,854 is the correct amount of lost duties from which to arrive at a penalty.

Mr. Donohue also performed a payments analysis on the spreadsheets obtained from CIA which allegedly record the flow of yen payments from CIA to CIJ. As it explained in opening argument, the government solicited Mr. Donohue to perform this payments analysis in the event that the Court decided that the yen transaction from CIA to CIJ was the proper basis for valuation. Mr. Donohue testified that if the yen payments from CIA to CIJ were utilized to calculate the loss of duty, the translation of those amounts into dollars would represent \$632,102 in lost revenue. Defendants argue that although the transaction between Hitachi Japan and CIJ serves as the proper basis of valuation, the \$632,102 figure serves as an acceptable surrogate even though it in-

cludes CIJ's profit on its transaction with CIA; thus, \$632,102, minus the duties lost in connection with the expired claims is the correct base from which to determine the maximum penalty allowed. Pursuant to the valuation statute and controlling jurisprudence, the Court agrees with the government that the dollar amount paid by MARTA to the joint venture must serve as the basis from which to calculate the loss of duty.

Although the transaction value, *i.e.*, the price paid by the importer to the seller, is the preferred method of valuation, § 1401a(b)(2)(A)(iv) specifies that the transaction value method is available only if "the buyer and seller are not related, or the buyer and seller are related but the transaction value is acceptable * * * under subparagraph (B)." *Id.* 1401a(g)(1) defines the term "related party" to mean, *inter alia*,

(F) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(G) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

Id. The statute also provides that

The transaction value between a related buyer and seller is acceptable for the purposes of this subsection if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; * * *

§ 1401a(2)(B). Defendants' position cannot be maintained under the provisions of the statute. The transaction between Hitachi Japan and CIJ is not statutorily viable under 1401a(g)(1)(G) because those two companies directly control the joint venture and, although defendants attest that the parties dealt with each other at arm's length, have not carried their burden of proof on the matter. There is no evidence in the record that the common control exerted by the parent companies over the joint venture did not influence the price paid or payable by CIJ. Moreover, the transaction between CIJ and CIA is not statutorily viable under 1401a(g)(1)(F) because the Court presumes, no doubt uncontroversially, that CIJ owns at least five percent of the shares of CIA. Defendants' proposed methods for valuation are necessarily rejected.

On the other hand, the government's position is fully supported by *Nissho Iwai American Corp. v. United States*, 10 Fed. Cir. (T) ___, 982 F.2d 505 (1992). *Nissho Iwai* involved a transaction remarkably similar to the case at bar. The Metropolitan Transportation Authority of New York City ("MTA") purchased rapid transit passenger cars from a middleman, the importer of record, which in turn purchased the cars from a Japanese manufacturer. Customs appraised the cars on the basis of transaction value. Customs used the price between the foreign manufacturer and the middleman to determine the transaction value of the first eleven entries, but used the price paid by MTA to the middleman to determine the transaction value of the later entries. The importer maintained that the transaction value of the later entries should also

have been based on the price between the middleman and the foreign manufacturer, and the court agreed. The court, "[a]ccepting that both the manufacturer's price and the middleman's price may serve as the basis of transaction value * * *" (*Id.* at ___, 982 F.2d at 510), ruled that "[o]nce it is determined that both the manufacturer's price and the middleman's price are statutorily viable transaction values, the rule is straightforward: the manufacturer's price, rather than the price from the middleman to the purchaser, is used as the basis for determining transaction value" (*Id.* at ___, 982 F.2d at 509). The defendants also attempt to rely on *Nissho Iwai* but the transaction values they urge are not statutorily viable under the related party provisions of the valuations statute. In *Nissho Iwai*, the court was scrutinizing two transactions each of which it accepted as statutorily viable; here, the statute expressly stated the statutory viability of the price paid by MARTA and the Court shall accept that position as did the court in *Nissho Iwai*. Furthermore, 1401a(f) of the valuation statute grants the Court wide discretion in determining value: "If the value of imported merchandise cannot be determined, or otherwise used for the purposes of this chapter, under [the previous subsections], the merchandise shall be appraised * * * on the basis of a value that is derived from the methods set forth in [the previous subsections] * * *. 1401a(f)(1). The evidence produced at trial has left the Court with only two options to choose from and since the related party yen valuation is expressly prohibited by statute, the Court must opt for the price paid by MARTA.

The wary reader may discern an ostensible inconsistency between the ruling that the valuation must be based on a dollar transaction and the holding that Hitachi America is negligent because it improperly invoiced in dollars. Yet the rule of law under the Code of Justinian and now the familiar maxim "*Caveat emptor*" expresses the common sense notion and the elementary economic principle that price and value are separate concepts. Hitachi America was required to list the "*purchase price of each item in the currency of the purchase* * * *" (§ 1481(a)(5)). Even if it is not used to determine dutiable value, the purchase price listed on the invoice is a crucial figure that provides Customs with information which may, for example, help it to conclude that parties are not contracting at arm's length. The purchase price listed on the invoice is a fundamental index upon which Customs relies in performing a variety of its administrative tasks. The fact that the provisions of the valuation statute may require an appraisal based on something other than the purchase price does not vitiate the plain mandate of § 1481(a)(5). The complementary notion is that the operation of the valuation statute may not render the purchase price false when appraisal is based on the currency of a transaction which is different from the correctly listed currency of purchase; in other words, had Hitachi America used the correct yen denomination, the fact that the appraisal is based on a dollar transaction would not constructively entail that Hitachi America submitted a false statement on the invoice.

B. The Statute Of Limitations Removes The First Twenty-One Entries From The Penalty Base:

The defendants argue that the statute of limitations applicable to 19 U.S.C. § 1592 actions truncates their liability for suit based on gross or simple negligence. The statute of limitations set forth in 19 U.S.C. § 1621 begins to run from the date any alleged negligent act is committed (and from the date an alleged fraudulent act is discovered):

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed * * *.

Id. In March and April 1991, Hitachi America and Hitachi Japan executed two-year waivers to any statute of limitations defense. At the time defendants executed the waivers, the statute of limitations had run on the initial twenty-two MARTA entries. The waivers expired on June 30, 1993 and on June 29, 1993, the government served process on defendants. As defendants concede, the waivers preserved the negligence and gross negligence actions on entries including and subsequent to March 1986, five years prior to the execution of the waivers. Defs.' Pre-Trial Mem. at 60 n.20.

The waivers did not purport to effect a mere prospective waiver. Oddly enough, the waivers itemized forty-two entries and defendants agreed not to "assert any statute of limitations defense in any action brought by the United States Government concerning forty-two (42) entries designated above with respect to the * * * period for which the statute of limitations is hereby waived."⁹ Although the language in the waivers conformed closely to the model waiver prescribed by the Customs Service in T.D. 76-33, 10 Cust. B. & Dec. 69 (1976), defendants omitted the model sentence declaring, "As of the date of this waiver, the statute(s) of limitations designated above has not yet run." Despite their apparent and coerced promise not to assert any defense whatsoever based on the statute of limitations, defendants pleaded the statute of limitations as an affirmative defense in their answers and raised it as a defense in their joint pre-trial memorandum. Furthermore, defendants raised the defense in their opening statements, Hitachi America raised it in its closing statement which was joined by Hitachi America, and Hitachi Japan raised it in its post-trial brief. Defendants' position is succinctly stated as follows: "Although Hitachi, Ltd. and HAL signed waivers of the statute of limitations in March and April 1991, these waivers—logically and legally—only served to waive the right to assert the statute of limitations for causes of action that had not yet expired. Indeed, the law does not permit the revival of a right that had been barred by the statute of

⁹ The Government eventually sued on only forty-one entries.

limitations." Hitachi Japan's Post-Trial Br. at 37. The facile assertion of that principle extenuates some thorny issues. In any event, if the Court were to hold that the waiver was ineffective with respect to the initial twenty-one entries for which the government seeks recovery, then only the alleged loss of revenue on the twenty entries occurring from March 1986 through June 1988 may be used to calculate penalties. Due to the significant practical effect of such a holding, the Court reviews the relevant jurisprudence.

The Court would like to hold defendants accountable for the promise contained in their voluntary waivers. Unfortunately, the government at no time addressed the statute of limitations issue despite the fact that it was continuously aware that defendants were raising and arguing the defense. Defendants' answers admitted that the waivers were extant but also raised the statute as an affirmative defense. As noted *supra*, defendants argued the statute in pre-trial and post-trial briefs and in opening and closing arguments. The § 1621 waivers had been marked for trial as plaintiffs' exhibits, but the waivers executed by Hitachi Japan were absent from the roughly 2000 voluminous exhibits contained in the government's evidentiary arsenal. The government failed to introduce the waivers into evidence despite the fact that they could only inure to its benefit. The only mention the government made, either in memoranda or at trial, in connection with the statute of limitations issue was at the end of its closing argument:

[Counsel for Hitachi America] suggests that there's a statute of limitations issue here with regard to negligence, and he says that the statute of limitations is five years. So, accordingly, if we have a six-year project, 99 percent of the product is shipped in the first five years, but the spare parts do not come in until the year six. By the time they are going to make their disclosure to the Customs Service, under that set of facts, there's no cause of action for negligence, because the five years have already elapsed here and Customs has no remedy for negligence.

I would assume, your Honor, that there will be briefing on whatever statute of limitations issues that there might be, and it might be worthwhile to have specific briefs on that issue, any particular questions that the Court has specifically identified, I think it would be better to go back and forth, rather than to try and have both sides put in their brief on the same day. It's kind of hard to address the other side's arguments, but you can address that.

Tr. 3240-41. Apparently government counsel did not understand the operation of the statute: under the hypothetical, the statute would have run only on the importations that occurred in the first year. Had the government seized its final opportunity to address the issue in its post-trial brief, no doubt it would have accurately described the statute's mechanics; but this it did not do. While it is mere conjecture and the Court has commented on the government's failure to include CIA and CIJ in this case, it may not be undue speculation to think that the government

wants another bite at the apple by addressing this argument in its action against those two parties.

In the interest of justice, on July 23, 1996 the Court issued a post-trial order commanding the parties to submit authentic copies of the waivers for inclusion in the record. Pursuant to Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice of defendants' waivers. The Court is empowered to take judicial notice of documents contained in the record (see, e.g., *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980)), and Hitachi America waivers appear at Appendix page 435 of the Government's Motion for Partial Summary Judgment. The Court takes judicial notice of the Hitachi Japan waivers filed with the Court pursuant to Court order. Defendants did not object to the inclusion of the waivers in the record. The government always alleged and defendants always admitted that these waivers were executed and no party challenges their authenticity. The Court now turns to the substantive inquiry.

The assertion that the running of a statute of limitations may bar the right to sue as well as the remedy draws upon expansive Supreme Court precedent. In *Campbell v. Holt*, 115 U.S. 620 (1885), the Court held that a legislative act does not deprive an individual of property without due process of law when it removes a statute of limitations defense which could have been invoked to prevent the payment of a debt. In contrast,

in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, [] such act deprives the party of his property without due process of law.

Campbell, 115 U.S. at 623. The reason for the disparate outcome under the Due Process Clause is that when a statute of limitations has run, "[W]here the suits are for the recovery of specific real or personal property, * * * the right of the plaintiff in the property was extinguished and had become vested in the defendant * * *. [I]n regard to debt or assumption in contract, the remedy alone is gone and not the obligation * * *." *Id.* at 625. Nevertheless, in *Davis v. Mills*, 194 U.S. 451, 454 (1904) (Holmes, J.), the Court reasoned that in certain circumstances a statute of limitations also extinguishes the right to sue for purely monetary claims:

[T]he ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape this distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced * * *. It is * * * a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere.

The issue in *Davis* was whether the defendant could avail himself of a Montana statute of limitations where suit was brought in another state but was based on a Montana statute creating a monetary cause of action

against corporate directors. The statute of limitations specifically applied to suits against corporate directors and the defendant was being sued in that capacity. The Court ruled that

while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else* * *. [The statute of limitations] so definitely deals with the liability sought to be enforced that, upon the principles heretofore established, it must be taken to effect [sic] its substance so far as it can, although passed at a different time from the statute by which that liability was first created.

Davis, 414 U.S. at 455-456. In *William Danzer & Co., Inc. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), the Court held that where the statute of limitations applied specifically to the cause of action created under the Interstate Commerce Act, retroactive extension of the limitations period to include a lapsed claim for damages would deprive the defendant of due process because the running of the statute extinguished the right to sue as well as the remedy. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the Court held that where the promulgation of a new limitations period removed any statute of limitations defense against a common law action for damages, due process was not violated because only the remedy had lapsed and not the right. A central distinguishing feature between the disparate results is that the right is extinguished when a special limitation period runs on a cause of action created by statute but only the remedy lapses when a general statute of limitations runs on a common law cause of action.

The 1978 revisions to the penalty statute, promulgated under the rubric of the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, Title I, § 110(e), 92 Stat. 897 (1978), redefined the penal causes of action the government may bring against an importer. The prior penalty statute made no distinction between fraudulent, grossly negligent, and negligent violations, and it provided forfeiture or the domestic value of the merchandise as remedies. The new statute creates three levels of culpability (§ 1592(a)), different burdens of persuasion and proof corresponding to the level of culpability (§ 1592(e)), and different maximum penalties according to the level of culpability (§ 1592(c)). With the promulgation of these new rules, Congress "overhauled the civil penalty provisions contained in 19 U.S.C. § 1592." Kevin C. Kennedy, *Civil Penalty Proceedings Under Section 592 of the Tariff Act of 1930*, 10 Fordham Int'l L.J. 147, 147 (1987). Although there have been statutory provisions addressing false or fraudulent entry of merchandise since the nascence of this country, there are no common law antecedents to the penalty statute. The penalty provisions have always been statutory rather than common law causes of action. See *Caldwell v. United States*, 49 U.S. (8 How.) 366 (1850) (discussing a customs penalty

action arising under a statute promulgated in 1799). Black's Law Dictionary describes the term "common law" as follows:

As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs* * *. In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments* * *. It consists of those principles, usage and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature.

Black's Law Dictionary 276 (6th ed. 1990) (citations omitted). Since the Customs Procedural Reform and Simplification Act enacted a novel penalty scheme that did not codify the common law, the reforms created new law for the purposes of the relevant Supreme Court jurisprudence. The same conclusion holds true for the revised special limitations provisions contained in § 1621. Therefore, the running of the § 1621 limitations period not only deprives the government of its remedy but also extinguishes its right to sue for civil penalties under § 1592. The question now becomes whether, by virtue of executing blanket waivers, the defendants revived the right of the government to sue on the extinguished causes of action.

As an initial matter, the fact that a statute of limitations has run on a statute does not necessarily entail that a court is deprived of jurisdiction to hear the matter. It is true that statutes of limitations may be jurisdictional in nature when they apply to a cause of action by which a government eschews its sovereign immunity in favor of vouchsafing its citizens a remedy for illegal government acts.¹⁰ However, the Supreme Court recently diluted previous authority dubbing federal limitations periods jurisdictional when it held that "the same rebuttable presumption of equitable tolling [of statutes of limitations] applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Since equitable principles cannot conceivably expand a court's jurisdiction, *Irwin* signifies a retreat from the jurisdictional mold into which the Court has previously cast statutes of limitations conditioning the renunciation of sovereign immunity. See, e.g., *Faden v. United States*, 52 F.3d 202, 206 (9th Cir. 1995); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991). *A fortiori*, statutes of limitations which do not condition a waiver of sovereign immunity do not operate as jurisdictional limits. Thus, stat-

¹⁰ It is the Court's view that constitutional imperatives such as due process trump the judicial construct of sovereign immunity and ensure that statutes of limitations conditioning the Government's liability for suit collapse under the weight of the indefeasible and inalienable democratic rights enshrined in the Bill of Rights. *U.S. Shoe Corp. v. United States*, 19 CIT ___, 907 F. Supp. 408, 424-25 (1995) (Musgrave J., concurring); see *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); *Bartlett v. Bowen*, 816 F.2d 695, 708 (D.C. Cir. 1978); *International Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1163 n.31 (D.Del. 1975).

utes of limitations outside the context of sovereign immunity are not jurisdictional perimeters but rather are equitable constructs erected to foster judicial economy and to ensure basic fairness to alleged lawbreakers.

Statutes of limitation find their justification in necessity and convenience rather than logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost* * *. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (citation omitted). Since defendants possess no fundamental right in the shelter provided by a statute of limitations, the running of the statute does not remove a cause of action from the court's jurisdictional compass: "filing a timely charge* * * is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Therefore, the fact that the statute of limitations had run on the early MARTA entries at the time defendants executed their waivers does not divest the Court of its jurisdiction to entertain suit based on those transactions. Although the expiration of the government's right to sue defendants did not result in a lack of jurisdiction, two questions remain: Did defendants possess the power to waive their rights to assert a statute of limitations defense before the Court? If so, did they or could they effectively waive those rights with respect to the causes of action which already had lapsed at the time they signed the waivers?

In *Midstate Horticultural Co., Inc. v. Pennsylvania R. Co.*, 320 U.S. 356, 358 (1943), the Supreme Court held that the defendant's attempt to waive the statute of limitations for an action under the Interstate Commerce Act was "invalid as being contrary to the intent and effect of the section and the Act." The central intent of the Interstate Commerce Act was to guard against rate discrimination in the transportation industry, and permitting private litigants to negotiate waivers of the limitations period could enable *de facto* discrimination. *Midstate Horticultural Co., Inc.*, 320 U.S. at 361-63. Likewise, the Court held that a plaintiff's attempt to waive his right to recover liquidated damages under the Fair Labor Standards Act was ineffective because it contravened Congressional intent and public policy. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945). In the latter case the Court ruled that "a statutory right conferred on a private party, but affecting public interest, may not be waived or released if such release contravenes the statutory policy." *Brooklyn Sav. Bank*, 324 U.S. at 704. These precedents are inapposite to the instant case because 19 U.S.C. § 1592 confers a right on the government rather than on a private party and there is no evident Congressional intent that would be contravened by allowing potential customs

penalty defendants to waive their right to a statute of limitations defense.

In the criminal context, federal circuit courts have held that defendants possess the power to waive a statute of limitations defense. Some courts have held that a mere guilty plea implicitly waives all nonjurisdictional defects including the statute of limitations defense. *See, e.g., Acevedo-Ramos v. United States*, 961 F.2d 305, 308 (1st Cir. 1992). Other courts emphasize the importance of a written waiver (*see, e.g., United States v. Del Percio*, 870 F.2d 1090, 1094 (6th Cir. 1989)), or an express waiver of the defense in open court (*see, e.g., United States v. Akmajian*, 647 F.2d 12, 14 (9th Cir. 1981)). The rule in one circuit is that a defendant "who pleads guilty can challenge the prosecution as time-barred only insofar as the indictment on its face shows that the limitations period had expired" (*United States v. Helmich*, 704 F.2d 547, 548 (11th Cir. 1983)), while the singular law of the Tenth Circuit is that a criminal statute of limitations "operate[s] as a jurisdictional limitation upon the power to prosecute and punish" so that in absence of an express waiver, a defendant may successfully allege the statute of limitations on appeal after having pleaded guilty (*United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992)). The clear weight of authority supports the view that a statute of limitations does not operate as a jurisdictional bar and defendants therefore may waive the defense expressly if not implicitly. Although some of the relevant criminal cases emphasize that the waiver occurred prior to the running of the statute of limitations (*see, e.g., Del Percio*, 870 F.2d at 1094), they do not indicate that the outcome wholly depended on that fact. None of the criminal cases discusses the issue of remedy versus right.

Case law from the civil arena also instructs on the issue of whether and when a defendant may effectively waive a statute of limitations defense. Illinois courts hold that a "special limitations period created by a statutory cause of action, such as wrongful death, cannot be waived because it is a condition of the right to sue itself." *Phillips v. Elrod*, 478 N.E.2d 1078, 1082 (Ill.App. 1 Dist. 1985) (citing *Muscare v. Voltz*, 438 N.E.2d 620, 622 (Ill.App. 1 Dist. 1982) ("A special limitation * * * may be contained within a statute that creates rights unknown to common law * * *. In such an instance, the time limitations in statutory causes of action are considered a condition of the liability itself and not one of remedy only")). Although in that circumstance the absolute prohibition against waiver in Illinois may be consistent with Supreme Court precedent ("[Limitations] provisions somee same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act" (*Danzer*, 268 U.S. at 613)), this Court declines to rule that the customs penalty statutes always and absolutely prohibit a waiver of the limitations defense. Such a ruling would enshrine bad policy. Not only may the execution of a waiver serve the parties' interests by providing more time for government investigation and by enhancing defendants' possibilities to avoid suit, but in con-

trast to the circumstances discussed by the Supreme Court in *Midstate Horticultural Co., Inc.*, in this case there is no overwhelming Congressional intent or public policy foreclosing the waiver avenue.

The Court is not fully persuaded by jurisprudence emanating from bankruptcy and tax opinions holding that attempted waivers were ineffective. Several bankruptcy courts have held that statutes of limitations providing that "[a]n action may not be commenced after * * *" a certain time period create a jurisdictional bar to bringing suit. See, e.g., *In re Butcher*, 829 F.2d 596, 600 (6th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988); *In re Barley*, 130 B.R. 66, 69 (Bankr.N.D.Ind. 1991). Unless Congressional intent or public policy manifestly counsel otherwise, the extinguishment of the government's right to bring suit should not be considered a jurisdictional bar, and as discussed *supra*, the Supreme Court has retreated from viewing the quintessential candidate, i.e., a statute of limitations conditioning sovereign immunity, as jurisdictional in nature. Moreover, the statute of limitations defense is an affirmative one which must be pleaded by the defendant under FRCP 8(c); to characterize certain statutes of limitations as jurisdictional perimeters would require a court to dismiss the tardy actions *sua sponte* (FRCP 12(h)(3)), an obligation inconsistent with the express provisions of FRCP 8(c). Under the Internal Revenue Code, a taxpayer's written extension of the limitations period was held invalid when the government failed to prove that the waiver was executed before the statute had run. *Mantzel v. Commissioner of Internal Revenue*, Tech. Mem. 1981-169 (April 9, 1981), 41 T.C.M. (CCH) 1237; see also *Blustein v. Eugene Sobel Co., Inc.*, 263 F.2d 478, 482 (D.C. Cir. 1959). However, these tax cases relied on the fact that the statutory waiver provisions expressly required that the waiver be executed before the limitations period had run.

The Court is favorably persuaded by other cases which have held that an attempt to effect a waiver of extinguished claims is ineffective. In *Chilean Nitrate Corp. v. M/V Hans Leonhardt*, 810 F.Supp. 732 (E.D.La. 1992), the court examined a statute of limitations providing that the defendant "shall be discharged from all liability * * * unless suit is brought within one year * * *" from the accrual of the action. The court held that

the evidence provided to the Court shows only that defendants agreed to the extension * * * one year after the limitations period expired * * *. [T]he Court cannot say conclusively that the defendants initially agreed to an extension within the one-year limitations period. 'When by an exchange of letters, *before the running of the statute of limitations*, it is agreed to extend the time for a fixed and reasonable period, the carrier's waiver of the statute is for that period only.' *Monarch Industrial Corp. v. American Motorists Ins. Co.*, 276 F.Supp. 972, 979 (S.D.N.Y. 1967) (emphasis added). While letters may have been exchanged before the statute ran in this case, the Court has seen no such evidence, and cannot now determine that [defendant's] defense is legally insufficient.

Chilean Nitrate Corp., 810 F.Supp. at 736. There is also persuasive precedent issuing from the Supreme Court of Rhode Island, which cited

"the general rule that ordinarily acts and conduct arising after the expiration of the time period for bringing suit cannot be relied upon to create either a waiver or an estoppel." *Cardente v. Travelers Ins. Co.*, 315 A.2d 63, 65 (R.I. 1974). Cf. *Gale v. Great Southwestern Exploration*, 599 F.Supp. 55, 58 (N.D.Okla. 1984) (ruling that where the federal statute of limitations states, "In no event shall any action be brought * * *", the limitation conditions the right to bring suit and deprives the court of jurisdiction); accord *Engl v. Berg*, 511 F.Supp. 1146, 1150 (E.D. Pa. 1981). The Court agrees with this line of cases and rules that because the running of the limitations period provided in § 1621 extinguishes the right of the government to bring suit, an attempt by a defendant to waive a statute of limitations defense to extinguished penalty actions shall be deemed ineffective when the defendant subsequently pleads and argues the statute of limitations before the Court.

It should be repeated that here the statute of limitations was "directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Davis*, 194 U.S. at 454. Section 1621 could hardly be more specific in its directive: "[I]n the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action *shall not be instituted* more than five years after the date the alleged violation was committed * * *." *Id.* (emphasis added).

The available legislative history does little to illuminate Congressional intent: "A suit brought to enforce a section 592 penalty arising out of gross negligence or negligence would have to be brought within five years after the violation occurs." H.R. Conf. Rep. No. 95-1517, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2253. Nevertheless, the starkly prohibitive language of the statute itself specifically commanding the Executive Branch to refrain from bringing suit under § 1592 evinces that the right to sue is extinguished when the statutory period lapses. The attempt here by the Executive Branch to flaunt the legislative commandment embodied in § 1621 must fail when a defendant asserts the statutory defense in open court, notwithstanding any previously cowed and inoperative promises.

There is a further difficulty in holding otherwise. Because the right to bring suit against the initial twenty-one entries was extinguished at the time the waivers were executed, Congress would have contravened the Due Process Clause if it had promulgated a lengthier statute of limitations purporting to revive the extinguished claims. If the Legislative Branch created the burial tomb for the expired right it initially created, and the passage of time rolled the tombstone shut according to the statutory terms and opinions of the Judicial Branch, how might a private citizen assume the role of sovereign to revitalize and resurrect the expired claim? With regard to the extinguished rights of action, the government stands before the Court like Lazarus up from the dead; yet no private citizen is invested with sovereign political power, let alone a power lacking in Congress itself. This is not to say that the Court is deprived of ju-

risdiction to entertain suit on the extinguished claims: the ruling of the Court rests comfortably within an interstice of the law's "seamless web" and requires a defendant to assert a statute of limitations defense against extinguished claims before a court entertains the issue. The Court is aware of the assertion in a treatise that the statute of limitations defense "may be waived either before or after the expiration of the prescribed time limit." 51 Am. Jur. 2d *Limitation of Actions* § 428 (1970). However, three of the four authorities cited in the treatise are either clearly distinguishable or do not stand for the proposition asserted: in *Titus v. Wells Fargo Bank & Union Trust Co.*, 134 F.2d 223, 224 (5th Cir. 1943), the court reasoned, "Limitation statutes operate on the remedy. They do not extinguish the right"; in *Taylor v. Soule*, 168 P.2d 281, 284 (Okla. 1946), the court concluded that the defendants had waived the limitations defense by failing to plead it; in *Welton v. Boggs*, 32 S.E. 232 (W. Va. 1898), the court held that a co-creditor may not plead on behalf of the defendant a statute of limitations defense that would have barred the other co-creditor's claim. The Court disagrees with *Par-chen v. Chessman*, 142 P. 631, 633 (Mont. 1914) ("a party may waive the benefit of the statute before or after the expiration of the prescribed time limit"). The Court also respectfully disagrees with *Union Bank of Switzerland v. HS Equities, Inc.*, 457 F.Supp. 515, 521 (S.D.N.Y. 1978) wherein the court reasoned in perfunctory fashion that although the damages claim had lapsed before the waiver was executed, "[T]he Court can find no reason not to accept its terms as broadly as it is written."

By pleading the statute of limitations in their answers and arguing it in their joint pre-trial brief, opening and closing arguments, and post-trial briefs, defendants satisfied their threshold obligations to establish an affirmative defense based on the statute of limitations. Courts have taken a liberal approach in applying the Federal Rules of Civil Procedure to statutes of limitations. FRCP 8(c) includes statutes of limitations among the litany of defenses that must be affirmatively plead. While the general rule is that a party waives an affirmative defense by failing to raise it in the answer, "the majority of federal circuit courts have held that when a defendant raises an affirmative defense in a manner that does not result in unfair surprise to the other party, noncompliance with Rule 8(c) will not result in waiver of the affirmative defense." *Vermont Mutual Ins. Co. v. Everett*, 875 F. Supp. 1181, 1189 n.3 (E.D. Va. 1995) (citations omitted). Moreover, although the party asserting an affirmative defense normally carries the burdens of pleading, production, and persuasion, some courts have carved out an exception to this general rule in circumstances similar to the case at bar. Some courts have ruled that when the plaintiff's remedy as well as its right to bring suit have lapsed, the burden of pleading and one or both of the burdens of production and persuasion fall upon the plaintiff to show that its action is not time-barred. *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112, 1118 (5th Cir. 1983); *Davidson v. Wilson*, 973 F.2d 1391, 1402 n.8 (8th Cir. 1992); *Anixter v. Home-Stake Production Co.*,

939 F.2d 1420, 1434 (10th Cir. 1991); *Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978); but see *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 718-719 (7th Cir. 1993). The Court is sympathetic to the notion that the extinguishment of the government's right to sue should ratchet up its burden to show that its claims are not time-barred.

The Court rules that although defendants to a customs penalty action are required to plead the statute of limitations and carry the ultimate burden of persuasion on that affirmative defense, they only bear the initial burden of production to show that the government's claims are time-barred in connection with extinguished causes of action. The burden then shifts to the government to show that the extinguished claims are actionable by virtue of an equitable mechanism such as tolling. *United States v. Thorson Chemical Corp.* 16 CIT 441, 445, 795 F.Supp. 1190, 1193 (§ 1621 limitations period was tolled where waivers were executed before statute had run). In the instant case, the government entered the dates of the entries into evidence and defendants cited and argued § 1621 in their pleadings, briefs, and opening and closing arguments. To have required defendants to present a case in chief on their affirmative defense would have been a superfluous and pedantic exercise. What would defendants have done other than point to the dates of entry, the statute of limitations, and then argue the extinguishment of the right to sue on the initial twenty-one entries? No new evidence or arguments would have been presented to the Court. Defendants' initial burden of production was discharged by the government's own submission of the dates of entry into evidence. At all stages of litigation the government had an opportunity to argue equitable tolling but failed to do so. The Court has failed to identify any way in which the government could have been prejudiced by defendants' promise not to assert a statute of limitations defense with regard to the claims that were extinguished when the waivers were executed; for example, the government was not lulled into inaction on viable claims. The burden of production to show that the right of action on the first twenty-one entries had expired was satisfied by the government's evidence and the government failed to meet its resulting burden to show why the extinguished claims remained actionable notwithstanding the ineffective waivers. The Court holds that by pointing to the entry dates and arguing at all stages of litigation that the extinguished claims were time-barred, the defendants carried their burden of persuasion and established their affirmative defense in connection with the first twenty-one MARTA entries.¹¹

C. The Court Assesses The Maximum Allowable Penalty:

The penalty base is comprised of the dollar value of merchandise entered into the United States between March 11, 1986 and the end of the project. With the expired claims removed from the penalty calculation,

¹¹ The Court recently rejected an odd argument by a defendant that the "continuing violation doctrine", which tolls a statute of limitations during a course of illegal conduct, was applicable to a § 1592 penalty case. *United States v. Complex Machine Works Co.*, 20 CIT ___, 937 F.Supp. 943 (1996). The Court dismissed the contention as a "fundamental misunderstanding" of the doctrine without addressing whether it has any relevance in penalty cases. *Id.* at ___, 937 F.Supp. at 944. Case law reveals that the doctrine has been applied only in employment relations cases.

\$772,985 is the base amount from which the Court assesses the appropriate penalty. The Court arrived at this figure by consulting the figures contained in Mr. Donohoe's initial and supplementary audits listing the dollar amounts that MARTA paid to the joint venture. From March 11, 1986 until the end of the project, the initial audit showed a loss of \$676,586 and the supplemental audit showed a loss of \$96,399, for a total loss of \$772,985. Mr. Donohue testified that there was no way to correlate payments to entries, but the Court notes that the Pre-Penalty Notice originally sent to Hitachi America listed the loss of revenue by entry and indicated \$680,292 in lost revenue beginning with the March 11, 1986 entry. Although the basis for this latter figure is not supported in the record, it serves in part to satisfy the Court that the \$676,586 figure from the initial dollar audit accurately reflects the loss of revenue from March 11, 1986 not including the amount from the supplemental audit, which, when included, brings the total to \$772,985. The statutory maximum amount of penalty for negligence is two times the amount of lost revenue, § 1592(c)(3), or \$1,545,970.

The Court has wide discretion in determining the amount of penalty to assess. The Court "does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight." *United States v. Menard*, 17 CIT 1229, 1229, 838 F.Supp. 615, 616 (1993) (finding that the appropriate penalty was equal to the amount of lost duties). Indeed, "Nothing in the statute precludes the court from awarding a penalty of zero in the event that factors justify such a judgment." *Modes II* at 635, 826 F.Supp. at 512. *Modes II* identified ten specific factors that the Court might utilize to compute the appropriate amount of penalty:

- (1) the defendant's good faith effort to comply with the statute;
- (2) the history of previous violations;
- (3) the nature and circumstances of the violation at issue ;
- (4) the degree of harm to the public;
- (5) the defendant's ability to pay;
- (6) the appropriateness of the penalty to the size of the defendant's business and the effect of the penalty on the defendant's ability to continue in business;
- (7) the economic benefit to defendants of the violation;
- (8) the value of vindicating agency authority;
- (9) the gravity of the violation; and
- (10) such other matters as justice may require.

Id. at 636, 826 F.Supp. at 513.

The defendants, who have no history of prior Customs violations, offer Hitachi America's intention to pay duty on escalation payments at the end of the project as evidence of good faith. Nevertheless, the evidence demonstrates that defendants were wrestling for several years with their known potential liabilities. In *Modes II*, the defendant immediately ceased his fraudulent behavior upon information by his attorney that his conduct was illegal. Here, defendants should have been more aggressive in resolving the issue. As Mr. Toda's efficient resolution of

the invoicing problem concerning inconsistent F.O.B. prices on the entry documents illustrates, Hitachi America is a sophisticated enterprise whose officers knew how to resolve Customs issues expeditiously. The failure to consult with Customs, though not evidence of bad faith, negates the claim of good faith deserving leniency. Admittedly, the nature and circumstances of the alleged violation operate somewhat in favor of defendants because the fact that the transaction was truly in yen is something that the Justice Department currently denies. But this is only one factor. Defendants received an economic benefit from the time value of the funds that should have been paid as duties as the project transpired. One crucial circumstance justifying the imposition of a substantial penalty is that defendants are members of a large multinational business consortium generating billions of yearly revenues and possessing every ability to pay the fine imposed without suffering financial hardship. Every year, Hitachi businesses glean tens of millions of dollars of cash flow from operating in this country and should have ascertained their duties with an aggression commensurate with the benefit they receive from doing business here. Furthermore, the interest in vindicating Customs' role in monitoring imports and enforcing Customs laws is paramount. Consideration of the factors recommends the maximum fine, and the Court assesses a penalty of twice the amount of the lost duties, which is \$1,545,970. This penalty assessment applies to defendants jointly and severally.

Hitachi America must also restore the loss of \$96,469 to the government unaccounted for in Hitachi America's payment of \$851,385 of lost duties, the sum listed on the Pre-Penalty Notice. The true amount of lost duties not including the supplemental audit was established at trial to equal \$851,455. Subtracting from that figure the sum that was paid in response to the Pre-Penalty Notice equals \$70. This \$70 in lost duty must be added to the \$96,399 figure from the supplemental audit to arrive at \$96,469 in unpaid lost duties which Hitachi America must restore to the government. The statute of limitations as it was written at the time of the violations could not operate to reduce the amount of lost duties recoverable. *United States v. Jac Natori*, ___ Fed. Cir. (T) ___, ___ F.3d ___ (1997).

Despite this substantial penalty, some might view the result of this case as a Pyrrhic victory for the government. After nine years of investigation and litigation that undoubtedly exacted millions of dollars of expenses from public and private resources, the government demonstrated that defendants are liable under the least severe provision of the civil penalty statute and must disgorge \$1,545,970 in fine. The government spent the vast majority of effort and time vigorously pursuing its theory of "a garden variety customs fraud" entitling it to a sixty-three million dollar penalty, and Hitachi Japan argues that the government's victory is so meager that it is entitled to costs as a prevailing party. An analogous claim seeking reimbursement for attorneys' fees and expenses was cogently rejected by Judge Newman in *United States v.*

Modes, Inc., 18 CIT 153 (1994) ("*Modes III*"). In *Modes III*, Judge Newman assessed a \$50,000 penalty for the double invoicing scheme in connection with the entry of duty-free merchandise. The government had sought the maximum fraud penalty of \$2,325,000, which equaled the domestic value of the merchandise. Because the amount of the penalty judgment was so insignificant compared to the maximum potential recovery, the defendant argued that it should be deemed the prevailing party. As the prevailing party, the defendant would be entitled to its claim for attorneys' fees and expenses under the Equal Access to Justice Act, 28 U.S.C. §2412. Judge Newman rejected the defendant's argument, noting that "[a] prevailing party is defined as one that 'succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Modes III*, 18 CIT at 155 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982). See also *Lurai Bros. & Co. v. Allen*, 672 F.2d 347, 357 (3d Cir. 1982) ("The losing party is not the prevailing party; what is black cannot be called white"). In the instant case, the government prevailed on the aiding or abetting claim and Hitachi Japan must bear its own costs.

CONCLUSION

Hitachi America negligently violated 19 U.S.C. § 1481, 19 U.S.C. § 1484, and 19 U.S.C. § 1485 by listing incorrect dollar amounts on entry documents in connection with imported merchandise. Hitachi America also negligently violated 19 U.S.C. § 1485 by failing to report escalation payments as they were received. Hitachi Japan is liable for aiding or abetting Hitachi America in its tortious course of conduct. Pursuant to 19 U.S.C. § 1592, defendants are jointly and severally liable for the \$1,545,970 penalty assessed by the Court, and Hitachi America must remit an additional \$96,469, the remainder of lost duties it has not yet restored to the government.

(Slip Op. 97-47)

AURUM JEWELERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94-05-00266

[Judgment for defendant.]

(Dated April 21, 1997)

Leonard M. Fertman Professional Corporation (*Leonard M. Fertman & Donald A. Rezak*) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Bruce N. Stratvert*), *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Senior Judge*: Plaintiff, Aurum Jewelers, Inc., challenges the United States Customs Service's classification of imported gold jewelry under subheading 7113.19.50 of the Harmonized Tariff Schedule of the United States (HTSUS), dutiable at a general Most Favored Nation (MFN) rate of 6.5% *ad valorem*. HTSUS § XIV, ch. 71, subheading 7113.19.50 (1993). Plaintiff claims the jewelry should be allowed duty-free entry under the column 1 "special" rate for subheading 7113.19.50, pursuant to the Generalized System of Preferences ("GSP"), 19 U.S.C. § 2461-66 (1988). *Id.* at subheading A7113.19.50 (1993); see 19 C.F.R. § 10.172 (1993). Plaintiff filed a protest against the liquidation of the merchandise. Upon denial of the protest, plaintiff instituted this action and a trial was held pursuant to 28 U.S.C. § 2640(a)(1) (1994). Jurisdiction is proper under 28 U.S.C. § 1581(a) (1994).

BACKGROUND

This dispute concerns the proper classification of imported gold jewelry, consisting of rings, chains, necklaces and earrings. Plaintiff contends the merchandise at issue is Malaysian in origin, and was hand carried from Malaysia to the United States via an intermediate, overnight stop in Singapore. Plaintiff claims the jewelry was not manipulated in any way in Singapore prior to shipment to the United States, and that no operations took place with respect to the jewelry which would deprive the merchandise of its otherwise permissible GSP duty-free preference.

Customs denied duty-free entry for the jewelry, because Customs inspectors found a number of the imported items had hallmarks of either unknown origin or hallmarks registered to a Singapore company, and found the description of the merchandise on the GSP documentation as well as the shipping invoice were inconsistent with the imported shipment of jewelry. Customs therefore withheld GSP treatment and applied the general MFN rate of 6.5%.

DISCUSSION

This case centers on whether Customs properly withheld GSP treatment for a shipment of jewelry classified as dutiable at 6.5% *ad valorem*.

The court makes its determinations "upon the basis of the record made before the court[.]" 28 U.S.C. § 2640(a) (1994). In order for merchandise to qualify for GSP treatment, it must come from a beneficiary developing country, it must be on the list of GSP-eligible articles, the sum of the cost or value of its materials plus the cost of its processing must be at least 35% of the item's appraised value, and it must be imported directly from the beneficiary developing country into the United States. 19 U.S.C. § 2463(a-b) (1988); see 19 C.F.R. §§ 10.171-10.178 (1993) (Customs' regulations pertaining to GSP established pursuant to 19 U.S.C. § 2463(a-b)). Plaintiff bears the burden of proving that Customs' determination is incorrect. 28 U.S.C. § 2639(a)(1) (1994).

In this case, no dispute exists as to specific tariff terms in either subheading 7113.19.50 or subheading A7113.19.50, HTSUS. Rather, in determining whether the items qualify for the GSP classification, the dispute turns on whether the jewelry at issue came from Malaysia, a beneficiary developing country at the time of importation, (see Act of Aug. 10, 1993, subch. D § 13802(b), Pub. L. No. 103-66, 107 Stat. 667 (extending duty-free treatment until Sept. 30, 1994,)) and whether the merchandise underwent any GSP-prohibited operations prior to entry into the United States or was imported directly into the United States. In addressing these issues, plaintiff must overcome the statutory presumption of correctness that operates in favor of Customs' factual determinations. 28 U.S.C. § 2639(a)(1) (1994) (describing presumption); see *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (limiting presumption to factual determinations); see also *IKO Indus., Ltd. v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997) (citing *Goodman*). Plaintiff argues that the merchandise is the product of Malaysia, and that it was imported directly into the United States.

Plaintiff's first witness, Mrs. Tan Hong Yee, is managing partner of Golden Goldsmith Jewelers of Singapore. Golden is the parent company of both Aurum Jewelers and Goldjew SDN BHD, a manufacturing subsidiary located in Malaysia. Mrs. Yee testified that the Goldjew factory is under her supervision and control, and that she ordered Goldjew to manufacture the jewelry at issue for sale in the United States. She further noted that neither Goldjew nor Aurum had hallmarks of their own. She stated that any hallmarks imprinted on jewelry imported by Aurum were created because they were manufactured from used machines. Those machines, imported into Malaysia from Singapore, contained dies having the hallmark or imprimatur of other companies. Mrs. Yee claimed she did not eliminate the hallmarks from the dies, because, to her knowledge, the use of the purchased hallmarks did not violate any Malaysian laws pertaining to the manufacture of jewelry. She explained that eliminating the hallmarks would thus have been an unnecessary business expense.

Mr. Heang Hock Yeo, president of Aurum, testified that Mrs. Yee requested that he pick up the jewelry at issue for export to the United States. He stated that he witnessed over several days in Malaysia the

manufacture of the jewelry at issue, and that he personally selected the items for sale in the U.S. He further explained that he hand-carried the jewelry via a commercial air carrier first to Singapore, where it was placed in a Golden company safe during an overnight transit stopover. Mr. Yeo testified that he and Mrs. Yee removed the jewelry from the safe the following day, and that he took it aboard the plane for the second leg of the journey to the United States. Plaintiff argues that, "[a]t no time, with the exception of the time the merchandise was in the company safe in Singapore was the jewelry at issue manipulated in any way or out of the custody and control of Mr. Yeo." (Pl.'s Br. at 8.)

Plaintiff further relies upon the documentation which accompanied the entry of merchandise to support its claim that the jewelry came from Malaysia and was imported directly into the United States. Plaintiff notes the GSP Certificate of Origin Form A and merchandise invoice both identify a total quantity of 40,000 grams of gold jewelry shipped for Aurum Jewelers. *Id.* at 14. Aurum further states that the Form A shows an air route shipment from Penang, Malaysia to Singapore to Los Angeles, additional evidence that the merchandise was destined for the U.S. when it left Malaysia.

The court does not agree that plaintiff's evidence makes it "abundantly clear" that the imported merchandise originated in Malaysia and that the merchandise was imported directly from Malaysia into the United States. *Id.* at 6. Although the testimony of plaintiff's witnesses, if accepted, could explain how non-Malaysian hallmarks might have been imprinted on the jewelry, neither witness was able to demonstrate that the jewelry with the hallmarks were actually manufactured in Malaysia by such Goldjew machines with other companies' hallmarks still in their dies. Mrs. Yee was in Singapore when the jewelry was actually manufactured. Mr. Yeo did not witness the manufacture of all of the jewelry, and testified that he was originally not aware of (1) any hallmarks on the imported jewelry, jewelry which he personally selected, or (2) the existence of hallmarks in the dies of some of the Goldjew machines.

The inconsistencies in the documentation accompanying the imported goods are also highly problematic. Although plaintiff asserts the description of the merchandise on the GSP Certificate of Origin Form A and product invoice, both of which Goldjew completed, are an identical match, both forms mischaracterize the items actually imported. The Form A and product invoice describe a shipment for Aurum of 40 total kilograms of gold jewelry. (Pl.'s Br. Exh. A (GSP Certificate of Origin Form A; Goldjew SDN BHD original Invoice)). The invoice furthermore values the shipment of goods at \$435,045. *Id.* While the actual shipment had a total weight of 39.983 kgs, the total value was \$416,747. *Id.* (Goldjew SDN BHD Corrected Invoice). The actual values and total values as initially indicated in the documents vary by 17 grams and \$18,298. Defendant concedes this variance is not great, (Def.'s Br. at 5,) and does not base its arguments on this factor alone. The court, however, when view-

ing the shipment in a disaggregated manner, finds there is a substantial variance between the actual and initially submitted values.

After Customs' inspectors discovered this variance, Goldjew issued a corrected invoice for Customs' review describing the actual value and type of goods imported into the United States. That revised invoice description is compared to the original invoice description below:

<i>Original invoice breakdown</i>	<i>Revised invoice breakdown</i>
13.7 kgs of 24K jewelry	2.194 kgs of 24K jewelry
20.0 kgs of 22K jewelry	27.709 kgs of 22K jewelry
6.3 kgs of 18K jewelry	10.080 kgs of 18K jewelry

(*Cf.* Pl.'s Br. Exh. A (original invoice); *id.* (corrected invoice)). There is a discrepancy of 11.506 kgs of 24K jewelry, 7.709 kgs of 22K jewelry, and 3.78 kgs of 18K jewelry between the actual merchandise shipped and the initial documentation—*i.e.*, the initial invoice and the Certificate of Origin Form A—describing the merchandise to be shipped.

Plaintiff acknowledges that the Form A is "intended to certify that the imported merchandise shipped under [the original invoice] was a product of Malaysia and was eligible for duty free treatment pursuant to the Generalized System of Preferences." (Pl.'s Br. at 14.) However, as the court has found, the description of jewelry provided on the Form A and the original invoice do not accurately represent the actual merchandise imported. In her testimony, plaintiff's witness Mrs. Yee discounted the significance of this substantial variance in gram weights for different jewelry articles of various carats. She claimed that any differences arose from the fact that, because the Form A had to be completed several days in advance of Mr. Yeo's departure with the merchandise and prior to the actual packaging of the ultimate shipment, the figures included on the Form A were only "estimates" of the actual shipment and could have varied slightly from the actual composition of the final shipment. However, the differences were not slight, but were in fact substantial. Moreover, the description and breakdown of the merchandise provided on the Form A is identical to the breakdown provided on the Malaysian Certificate of Origin form certified to be correct only *one* day prior to the date of export. Thus, the jewelry documented as having been exported from Malaysia did not match the goods that ultimately entered the United States.

Such significant discrepancies raise serious questions as to whether the jewelry was imported directly from Malaysia into the United States, as required by 19 U.S.C. § 2463(b) (1988) and 19 C.F.R. § 10.175 (1993) to qualify for GSP treatment. GSP rates "apply to those products which are properly classified under a provision for which a special rate is indicated and for which all of the legal requirements for eligibility for such program or programs have been met." General Notes 3(a)(iii), 3(c)(i), HTSUS (1993 Supp. I); *see* HTSUS Preface at 1 (noting the legal text of the HTSUS includes General Notes). It is not at all clear that the merchandise was directly imported from a beneficiary country to the United

States. When imported items are of questionable origin, "the article[s] shall not be considered to have been produced in the beneficiary developing country." 19 C.F.R. § 10.177(b) (1993). Taking into account the documentary inconsistencies, as well as the credibility of the witnesses, including the plaintiff witnesses' interest in the outcome of this case, the court finds that (1) plaintiff has not presented sufficient evidence to overcome Customs' presumption of correctness and (2) the jewelry was properly denied GSP treatment.

CONCLUSION

Based on the statutory language and the applicable case law, plaintiff has not presented sufficient evidence to override Customs' presumption of correctness. The court finds Customs' classification under subheading 7113.19.50, HTSUS, to be correct. Judgment will be entered accordingly.

(Slip Op. 97-48)

CDCOM (U.S.A.) INTERNATIONAL, INC. PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Court No. 96-11-02533

[Plaintiff's Motion to Set Aside the Order of the Court denied; Plaintiff's Motion for Rehearing denied. Defendant's Motion to Dismiss granted as a Summary Judgment.]

(Decided April 21, 1997)

Peter S. Herrick for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Bruce N. Stratvert*, Trial Attorney) for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge*: Plaintiff CDCOM (U.S.A.) International, Inc. ("CDCOM") filed a Motion To Show Cause ("Motion to Show Cause") why merchandise it imported should not be released by the United States Customs Service ("Customs"). Defendant responded with a Motion To Dismiss ("Motion To Dismiss"), claiming this Court lacked subject matter jurisdiction.

At a telephonic hearing of this matter on November 26, 1996, the Court denied Plaintiff's Motion to Show Cause for lack of cognizable evidentiary support. Because the United States provided some evidence admissible under USCIT Rule 56 standards, the Court held in abeyance its

Motion to Dismiss to permit the Defendant to provide a proper foundation for the documentary evidence it had submitted. Thereafter, Defendant filed a Supplemental Submittal of evidentiary material in support of its Motion To Dismiss.

Before the Court ruled on the Motion To Dismiss, Plaintiff filed a Motion to Set Aside the Order of the Court Denying Plaintiff's Motion to Show Cause ("Motion To Set Aside"), submitting additional evidence to the Court, and maintaining the Court should order the immediate release of its merchandise. Defendant filed an Opposition to Plaintiff's Motion to Set Aside ("Opposition To Motion To Set Aside").

Prior to determination of either pending motion, Plaintiff filed a Motion for Rehearing ("Motion For Rehearing"), requesting the Court to set a rehearing on its Motion To Set Aside.¹ Defendant has filed an Opposition to Plaintiff's Motion for Rehearing ("Opposition to Rehearing"). The Court now denominates Defendant's Motion to Dismiss as a Motion For Summary Judgment, grants that Motion, and denies Plaintiff's pending Motions.

II

STATEMENT OF FACTS

CDCOM is a Florida corporation which imports, *inter alia*, video graphics accelerator (VGA) cards from Hong Kong for sale in the domestic market. Supplemental Declaration of Yuk Chuen Gene Ng ("Ng Supplemental Decl"), at ¶¶ 1 and 3.

On June 25, 1996, Customs examined a shipment of VGA cards imported by CDCOM ("First Shipment"), and discovered that the packaging for the VGA cards contained the Microsoft Windows Stylized Flag Logo ("Flag Logo") and that the word "Microsoft" was spelled "Microsoft." Declaration of Thomas M. Chance ("Chance Decl") at ¶2-3. The VGA cards themselves bore no Microsoft logo. Peter S. Herrick letter of September 20, 1996, Ex. 13 to Motion to Dismiss. On June 27, 1996, Customs detained the shipment for possible violations of the trademark law when the importer's broker, Pronto Cargo Brokers, failed to produce proof of authorization to use the Flag Logo. Chance Decl at ¶4.

In a July 2, 1996 letter, Microsoft said that although the manufacturer of the VGA cards, Silicon Integrated Systems ("Silicon") was licensed to use the "Designed for Windows 95" logo for certain of its products, it was not authorized to use the Flag Logo for the VGA cards seized in the First Shipment. Microsoft Letter of July 2, 1996, Ex. C to Supplemental Submittal. On July 12, 1996, Customs seized the First Shipment for trademark violations. Chance Decl at ¶7.

On July 26, 1996, Customs notified CDCOM that its VGA cards were being seized pursuant to 19 U.S.C. § 1526(e), because "the articles bear a counterfeit version of the trademark(s), 'Microsoft' which is registered with the United States Government." Customs Letter of July 26, 1996, Ex. D to Supplemental Submittal. Plaintiff exercised its right to petition

¹ It is unclear why Plaintiff chose to file two separate motions.

Customs for relief under 19 U.S.C. § 1618 on August 7, 1996, followed by an addendum on August, 16, 1996. Ex. F and G to Supplemental Submittal. Plaintiff alleged in its August 7, 1996 petition that Customs had "failed to state that the seizure was being made under 19 U.S.C. § 1595a(c), and that this was a permissive seizure as required by the Customs Modernization Act (19 C.F.R. § 162.23(b))". Ex. F to Supplemental Submittal. Plaintiff also lodged a protest on August 2, 1996 against exclusion of the merchandise pursuant to 19 U.S.C. § 1514(a)(4) and requested immediate review. Exhibit A to Complaint.² Customs denied the protest in a letter to Plaintiff dated August 26, 1996. Exhibit B to Complaint.

On July 24, 1996, Customs examined and detained a second shipment of VGA cards, with the Flag Logo on its packaging ("Second Shipment"). Declaration of Philip Spataro ("Spataro Decl") at ¶¶2-3, Ex. 2 to Supplemental Submittal. On August 22, 1996, the Second Shipment was seized by Customs for possible trademark law violations after it was informed that the manufacturer, Well Data Computers, Ltd. ("Well Data"), was not licensed to use the Flag Logo. Spataro Decl at ¶¶5 and 6. In its letter of August 16, 1996, Microsoft said Well Data was not among licensed to use the "Windows Compatible" or "Designed for Windows 95" logos on VGA cards or hardware in general, and that it did not license the Microsoft Windows logo for external use. Microsoft Letter of August 16, 1996, Ex. K to Supplemental Submittal.

CDCOM was notified of the second seizure by Customs in a letter dated September 6, 1996. Customs Letter of September 6, 1996, Ex. L to Supplemental Submittal.

Plaintiff exercised its right to file a Petition for administrative relief with respect to the Second Shipment on September 20, 1996 and requested Customs to review the Petition immediately. Exhibit M to Supplemental Submittal. Pursuant to 19 U.S.C. § 1499(c)(5)(B), Customs took no action on the Petition within thirty days. On November 13, 1996, Plaintiff filed this suit.

III

DISCUSSION

A

THE COURT HAS NO JURISDICTION OVER THIS CASE

Plaintiff asserts jurisdiction under alternative statutory provisions, relying on either 28 U.S.C. § 1581(a) or § 1581(i)(3).³

²For purposes of deciding these Motions, the Court will take Plaintiff's Complaint, to which are attached various documents which purport to be letters from Plaintiff's counsel, as establishing a foundation for those letters, since the Complaint is signed by Plaintiff's counsel, and since they form the basis for establishing facts apparently uncontested by either party.

³Plaintiff had originally contended in its Opposition to Motion to Dismiss that Customs' determination that the VGA cards are counterfeit should be set aside under the authority of Section 706(2)(A) of Title 5 of the United States Code which provides that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." Opposition at 7. In asserting Section 706(2)(A), Plaintiff alleges that Customs violated 5 U.S.C. § 552(b)(4) and 18 U.S.C. § 1905 by releasing trade and commercial information to Microsoft. At the telephonic conference held on November 26, 1996, both parties conceded that allegations of possible criminal conduct by Customs are not appropriate matters for resolution before this Court.

28 U.S.C. § 1581(a) grants this Court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."⁴ Section 1581(i)(3), provides exclusive jurisdiction over civil actions filed against the United States arising out of any law providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." Section 1581(i)(4) grants jurisdiction in connection with the "administration and enforcement" of such laws.

For the reasons following, the Court concludes that it does not have jurisdiction over this action.

1

SINCE CUSTOMS' ACTIONS CONSTITUTED A "SEIZURE," THERE IS NO SECTION 1581(a) JURISDICTION

The court in *Milin Industries, Inc. v. United States*, 12 CIT 658, 691 F. Supp. 1454 (1988), explained how the distinction between exclusion and seizure affects jurisdiction:

If Customs' action was an "exclusion," * * * jurisdiction would lie with this Court under 28 U.S.C. § 1581(a) (1982) because Customs denied an importer's protest against the exclusion of merchandise * * * If Customs' action was a "seizure," * * * jurisdiction would lie with the United States District Court * * * under 28 U.S.C. § 1356 (1982).

12 CIT at 659, 691 F.Supp. At 1454. See also *Int'l Maven, Inc. v. McCauley*, 12 CIT 55, 57, 678 F. Supp. 300, 302 (1988).

The jurisdiction of the Court, therefore, depends upon the nature of the action taken by Customs. As explained in *R.J.F. Fabrics, Inc. v. United States*, 10 CIT 735, 651 F. Supp. 1431 (1986),

[T]he act of exclusion differs from that of seizure. The practical effect of the former act is to deny entry into the customs territory of the United States. The importer may then dispose of the goods as he chooses. In the case of seizure, however, the government often takes control of the merchandise, and may ultimately institute forfeiture proceedings.

10 CIT at 738, 651 F. Supp. At 1433.

Based on *R.J.F.*, Plaintiff's present counsel argued in *International Maven* that goods were excluded and not seized.⁵ 12 CIT at 57, 678 F. Supp. At 302. There the court concluded that the case involved a seizure and not a protest, because: 1) the plaintiff's protest indicated that it was challenging the "seizure" of the merchandise; 2) the plaintiff received a

⁴ Section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515, concerns the right of a party to bring a civil action in connection with the denial of a protest by Customs under Section 1514, Title 19. In relevant part, 19 U.S.C. § 1514 provides that "the exclusion of merchandise from entry or delivery * * * under any provision of the customs laws * * * shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *" 19 U.S.C. § 1514(a).

⁵ Plaintiff's counsel is thus well aware that we are required, paraphrasing a higher law, to render unto the district court that which is seizures.

notice of seizure from Customs; 3) the government had control over the merchandise; and 4) upon notice, the plaintiff was required to choose between immediate forfeiture proceedings or a petition for relief from seizure. 12 CIT at 58, 678 F. Supp. At 302.

The facts of this case⁶ are in all pertinent matters identical to those in *International Maven*. Customs made an admissibility determination within the thirty-day statutory period required under 19 U.S.C. § 1499(c)(5)(A), declaring both shipments of the subject merchandise "seized" and issuing the appropriate seizure notices to Plaintiff.⁷

Indeed, the seizure notices received by Plaintiff indicate the proper procedures for forfeiture and protest were made available to Plaintiff. See Letters from Customs to CDCOM providing notices of seizure, Ex. D and Ex. L to Supplemental Submission. Consistent with the *R.J.F. Fabrics* standard and the facts of *International Maven*, nowhere in the record is there any indication the government has surrendered control of that seized merchandise.

Finally, Plaintiff's correspondence with Customs expressly refers to "seized" and not "excluded" merchandise. See Ex. F and Ex. M to Supplemental Submittal. The familiarity of Plaintiff's counsel with *International Maven* indicates that choice of language could not have been inadvertent.⁸

Since Plaintiff's protest is deemed a protest of a seizure, it is not a "valid" protest for purposes of § 1514(a), and, therefore, the matter is not appealable to this Court.

2

SECTION 1581(i) DOES NOT PROVIDE RESIDUAL JURISDICTION IN THIS CASE

Plaintiff also asserts jurisdiction over the case pursuant to 19 U.S.C. § 1581(i)(3) and (4).⁹

Section 1581(i) jurisdiction is residual, meaning it "may only be invoked when other available avenues of jurisdiction are manifestly inad-

⁶ Because the parties have chosen to submit evidentiary materials competent portions of which have not been excluded, the Court is, pursuant to CIT Rule 12(b), treating this matter as a Motion For Summary Judgment under the standards enunciated in CIT Rule 56. As is set out below, there is no genuine issue of material fact and the Defendant is entitled to a Summary Judgment as a matter of law.

⁷ Under 19 U.S.C. § 1499(c)(5)(A), since both seizures occurred within thirty days of the presentation for examination, the merchandise was never deemed excluded. See *Tempco Marketing v. United States*, Slip Op. 97-21 at 7 (February 10, 1997). Congress has also expressly provided that merchandise may be detained and then seized without having gone through a period of exclusion. See 19 U.S.C. § 1499(c)(4).

⁸ Recently, the four factor test was applied in a similar series of actions. See *Tempco Marketing*, Slip Op. 97-21 (Feb. 10, 1997); *Genii Trading Co. v. United States*, Slip Op. 97-22 (Feb. 10, 1997) (both cases involved the detention, exclusion, and subsequent seizure of imported rice noodles allegedly bearing counterfeit labels). Although Plaintiff points out that the mere fact that a case involves a trademark does not mean that this Court has no jurisdiction to review Custom's actions, when the trademark issue is substantive rather than incidental, this Court can defer to the expertise of the district courts. See *M.W. Kasch Co. v. United States*, 10 CIT 460, 463, 640 F. Supp. 1335, 1338 (1986). See also *Lois Jeans & Jackets, U.S.A. v. United States*, 5 CIT 238, 566 F. Supp. 1523 (1983) (plaintiff's challenge to validity of notices for imports allegedly infringing on trademark was properly before the Court of International Trade; infringement issue, however, was not and should be addressed in district court). That issue need not be addressed, however, since the district court remedy is certainly not "manifestly inadequate."

⁹ 28 U.S.C. § 1581(i)(1)-(3) provides in relevant part:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

Continued

equate or it is necessary to avoid extraordinary and unjustified delays caused by requiring the exhaustion of administrative remedies", *Milin Industries*, 12 CIT at 661, 691 F. Supp. at 1456. "[A] party must exhaust meaningful opportunities for protest instead of resorting to § 1581(i) as a jurisdictional basis." *R.J.F. Fabrics*, 10 CIT at 740, 651 F. Supp. 1434.

Plaintiff seeks to circumvent district court jurisdiction by asserting that Customs was "applying its 'international trade laws' when it decided to seize the merchandise." The validity of Customs' actions pursuant to 19 U.S.C. § 1526(e), however, hinges not on Customs' interpretation of its authority under 19 U.S.C. § 1526(e), but on whether it correctly determined that the merchandise bore a counterfeit trademark under relevant trademark laws. For this court to assert jurisdiction over this case would require an in-depth inquiry into trademark law. See *International Maven*, 12 CIT 55, 678 F. Supp. 300. Trademark law is purely domestic, not "international trade law."

Plaintiff's other argument for jurisdiction under § 1581(i)(3) appears to be that detention related to a quantitative restriction on imported goods equals an embargo. See *R.J.F. Fabrics*, 10 CIT at 743, 651 F. Supp. at 1437. In contrast to *R.J.F. Fabrics*, this action challenges a seizure based upon trademark law. Although Customs' authority to seize counterfeit goods under 19 U.S.C. § 1526(e)¹⁰ might be construed as a law pertaining to an "embargo" against counterfeit goods under 28 U.S.C. § 1581(i)(3), in the statute, the word "embargoes" is followed by "or other quantitative restrictions." As the Supreme Court noted in *K Mart Corp. v. Cartier*, 485 U.S. 176, 108 S. Ct. 950 (1988), "the ordinary meaning of 'embargo,' and the meaning that Congress apparently adopted in the statutory language 'embargoes or other quantitative restrictions,' is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise." 485 U.S. at 185.

In this case, the import prohibition against goods that infringe upon trademark laws is unrelated to the administration or enforcement of a quantitative or quota restriction. See *McCarthy d/b/a Long Beach Classic Imports v. Heinrich*, 11 CIT 820, 822, 674 F. Supp. 863, 865 (1987) (an action which contested a seizure and forfeiture was dismissed, as the challenge did not fall within paragraphs (1)–(3) of subsection (i) of Section 1581). Accordingly, and in light of *K-Mart*, jurisdiction pursuant to 28 U.S.C. § 1581(i) does not lie in this Court.

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

¹⁰ Section 1526(e), Title 19, United States Code, provides that:

merchandise bearing a counterfeit mark (within the meaning of section 1127 of title 15) imported into the United States in violation of the provisions of section 1124 of title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws.

B

PLAINTIFF IS NOT ENTITLED TO A REHEARING

In its Motion To Set Aside, Plaintiff apparently seeks a rehearing under USCIT Rule 60(b) of the Court's prior ruling that the declaration of Yuk Chuen Gene Ng submitted in support of Plaintiff's Motion To Show Cause was incompetent. In support of that request Plaintiff asserts:

It was excusable neglect, as contemplated by Rule 60(b), that the declaration filed with the Court in support of its motion did not adequately show that the declarant was competent to testify on matters before the Court.

Motion To Set Aside at 1.

Nowhere, however, in briefs, declarations or elsewhere, does Plaintiff provide any factual basis for that assertion.

Although CDCOM does not specify which of the several provisions of Rule 60(b) it relies, Plaintiff appears to have hung its argument on the slender peg of Rule 60(b)(1). In order to qualify for Rule 60(b)(1) relief, the "movant must demonstrate that he has a meritorious defense and that arguably one of the four conditions for relief applies—mistake, inadvertence, surprise, or excusable neglect." *Avon Products, Inc. v. United States*, 13 CIT 670, 672 (1989)(quoting *Universal Film Exchanges Inc. v. Lust*, 479 F.2d 573, 576 (4th Cir. 1973)).

The term "excusable neglect" is not defined in the USCIT rules and its meaning must therefore be determined from case law. The cases in which parties have petitioned and obtained relief under Rule 60(b) are narrowly circumscribed. This Court has denied relief pursuant to Rule 60(b)(1) where in determining whether sufficient inadvertence or excusable neglect exists, plaintiff's explanation was "neither sufficiently specific nor persuasive to comply with the requirement of Rule 60(b)." *Washington Int'l Ins. Co. v. United States*, 16 CIT 480, 483, 793 F. Supp. 1091, 1093 (1992) (motion to set aside dismissal under USCIT Rule 86(b) for lack of prosecution is denied without prejudice because plaintiff failed to adequately explain why it failed to remove its action from the Joined Issue Calendar within the six month period prescribed by the Rule).¹¹ Neither carelessness nor ignorance on the part of the litigant or attorney provides grounds for relief under Rule 60(b)(1). *Avon Products*, 13 CIT at 672.

CDCOM asserts that its failure to present competent evidence in the declaration attached to its Motion To Show Cause was excusable neglect, and has since re-submitted a declaration which attempts to meet the evidentiary standards required by USCIT Rule 56(f). Mot. to Set Aside at 1-2. In its Motion To Set Aside, however, CDCOM fails to provide not only the necessary foundation for evidence previously submitted in its Motion to Show Cause, but also fails to meet the evidentiary

¹¹ In *Washington International*, the court held that under Rule 60(b), "the moving party must present facts sufficient to demonstrate that the delay in filing was the result of * * * excusable neglect." *Id.* Furthermore, in *United States v. Atkinson*, 3 Fed. Cir. (T) 15, 748 F.2d 659 (1984) the Court of Appeals upheld the denial of relief under Rule 60(b) noting that there was no evidence in the record, other than "naked and unsupported assertions," to support a finding of excusable neglect. 3 Fed Cir (T) at 18, 748 F.2d at 660.

standards required for the Court to assess whether there exists excusable neglect sufficient to warrant relief.

Nowhere do CDCOM's pleadings and supplementary declarations attempt to explain why this Court should disturb its previous ruling. CDCOM's reliance on unsupported and unexplained assertions of excusable neglect does not rise to a level in which a rehearing should be granted. Neglect there may well have been; that does not in itself make that neglect excusable.

CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss is granted as a final Summary Judgment, and Plaintiff's Motions to Reconsider and Motion for a Rehearing are denied.

(Slip Op. 97-49)

MITSUI & CO., LTD., MITSUI & CO. (U.S.A.) INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FLORIDA WIRE & CABLE CO., DEFENDANT-INTERVENOR

Court No. 90-12-00633

(Dated April 22, 1997)

JUDGMENT

ORDER

MUSGRAVE, *Judge*: Upon consideration of the parties' satisfaction with the remand redetermination expressed verbally, and no written comments having been received by the Court, it is hereby

ORDERED that the U.S. Department of Commerce's remand redetermination is sustained in its entirety; and it is further

ORDERED that this action is dismissed.

(Slip Op. 97-50)

NEW ZEALAND LAMB CO. INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 91-04-00297 and 91-04-00297-S

[Plaintiff moved for summary judgment challenging the assessment of interest on the amount of duties owed on liquidation of certain frozen lamb meat products and requests a refund of the interest paid. Defendant opposed the motion and cross-moved for summary judgment. *Held*: Plaintiff's motion for summary judgment is granted and defendant is ordered to refund the interest payments made, with interest and costs.]

(Decided April 22, 1997)

Wigman, Cohen, Leitner & Myers, P.C. (Edward J. Farrell) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*James A. Curley*) for defendant.

OPINION

MUSGRAVE, *Judge*: Plaintiff brings this action to contest the interest assessment that defendant, the United States Customs Service ("Customs"), imposed on the subject merchandise after liquidation. Customs initially accepted a countervailing duty deposit rate of NZ.36 cents per pound when the subject merchandise was entered. Customs subsequently affixed a countervailing duty rate of NZ\$.3602 per pound at the time of liquidation and billed the Plaintiff for the difference. Customs later imposed an interest assessment on the difference between the estimated duty deposited and the liquidated duty amount based on 19 U.S.C. § 1671f(b) (1988). However, the countervailing duty rate remained constant throughout the time period in question. The Court finds that Customs mistakenly applied the incorrect countervailing duty deposit rate at the time of entry. Customs' mistake places this action outside the purview of the countervailing duty statute and thereby bars the imposition of interest on the difference between the deposit amount and the liquidated amount. The Court grants plaintiff's motion for summary judgment and awards the plaintiff the amount of interest paid with interest as well as costs.

BACKGROUND

The plaintiff, New Zealand Lamb Company, Inc. ("NZL"), imported frozen lamb meat under eight entries made between December 18, 1985 and July 30, 1986. The lamb meat was subject to a countervailing duty order dated September 17, 1985. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lamb Meat from New Zealand*, 50 Fed. Reg. 37,708 (1985). The countervailing duty order required a cash deposit equal to NZ\$0.3602/lb. *Id.* Customs, however, collected a countervailing duty deposit of NZ.36 cents/lb. for each of the eight entries. Six of the entries were subsequently liquidated on December 15, 1989 and the other two entries were liquidated on December 22, 1989. At the time of liquidation, Customs determined that the counter-

vailing duty deposited was less than the duties owed and Customs billed NZL for the difference. On March 23, 1990, Customs billed NZL for interest on the difference between the amount deposited and the liquidated amount. NZL paid the difference in duties but filed Protest 2704-0-00278 on June 21, 1990 disputing the assessment of interest. Customs denied the protest on October 26, 1990. NZL subsequently paid the interest and filed a summons with the Court on April 19, 1991 and the accompanying complaint on May 8, 1991. Customs filed its answer on September 9, 1991.

Customs moved to sever and dismiss on April 16, 1992 and NZL filed its opposition to dismiss and filed a cross-motion for judgment on the pleadings on May 19, 1992. Customs filed a response on June 18, 1992 and NZL filed its reply on July 6, 1992. The Court issued its initial decision on December 8, 1992 granting NZL's motion for judgment on the pleadings with respect to Court No. 91-04-00297-S which was severed. On February 4, 1993 Customs appealed the decision to the Court of Appeals for the Federal Circuit ("CAFC") which vacated and remanded the case on November 14, 1994.

NZL filed a motion for summary judgment on February 29, 1996 and Customs filed a cross-motion for summary judgment on May 20, 1996. NZL filed its opposition on August 13, 1996 and Customs filed its reply on August 16, 1996.

STANDARD OF REVIEW

The Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, * * *" 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). "[Substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomantana, S.A. v. United States*, 10 CIT 399, 404-5, 636 F. Supp. 961, 966 (1986), *aff'd* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

Both parties have moved for summary judgment. Summary judgment is proper when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Ct. Int'l Trade R. 56. Although the parties disagree on the factual issue of whether the correct amount of duty was tendered at the time of entry, the Court finds that Customs' initial error precludes the need for the Court to address

the factual issue in contention. As there are no material factual issues, the Court has the power to render summary judgment.

DISCUSSION

The Court will address the two issues that are the subject of this remand. The first issue is whether Customs erred by refusing to accept the correct amount of countervailing duties when offered in deposit.¹ The Court finds that Customs erred in collecting the incorrect amount of countervailing duty at the time the subject merchandise was entered. This finding renders moot the factual issue of whether the correct amount of duty was tendered and whether it was refused. The second issue pertains to whether the Customs' error precludes the assessment of interest based on the difference between the amount of countervailing duty deposited and the amount of countervailing duty required by the countervailing duty order. The Court finds that the Customs error precludes the assessment of interest.

I. CUSTOMS ERRED IN FAILING TO COLLECT THE CORRECT AMOUNT OF COUNTERVAILING DUTY UPON ENTRY.

Customs has the obligation to collect a cash deposit on goods subject to an outstanding countervailing duty order in the amount equal to the countervailable subsidy. Customs did not fulfill its obligation in the instant case. Under 19 U.S.C. § 1671e(a), Customs is directed to assess countervailing duty on goods found to be within the scope of a countervailing duty order. The statute states:

Within 7 days after being notified by the Commission of an affirmative determination under section 1671d(b) of this title, the administering authority shall publish a countervailing duty order which—

(1) directs customs officers to assess a countervailing duty equal to the amount of the net subsidy determined or estimated to exist, * * *

19 U.S.C. § 1671e(a) (1988). In addition, section 1671h states:

For all entries, or withdrawals from warehouse, for consumption of merchandise subject to a countervailing duty order on or after the date of publication of such order, no customs officer may deliver merchandise of that class or kind to the person by whom or for whose account it was imported unless that person complies with the requirement of subsection (b) of this section and deposits with the appropriate customs officer an estimated countervailing duty in an amount determined by the administering authority.

19 U.S.C. § 1671h (1988). The U.S. Department of Commerce ("Commerce"), the administering authority, published a final countervailing duty order for lamb meat from New Zealand which stated:

The net bounty or grant for the review period is NZ\$0.3602/lb. Therefore, we are directing the U.S. Customs Service to continue to

¹ The CAFC remanded the case based on two issues: (1) "whether Customs erred by refusing to accept the correct full amount of countervailing duties when offered in deposit;" and (2) "whether, if Customs did so err, the result was that New Zealand Lamb was not required to pay interest on the resulting underpayment. Those are the issues which lie at the heart of New Zealand Lamb's protest and which should be decided in the first instance by the trial court." *New Zealand Lamb Co., Inc. v. United States*, 12 Fed. Cir. (T) ___, ___, 40 F.3d 377, 381 (Fed. Cir. 1994).

suspend liquidation of all entries of lamb meat from New Zealand which are entered, or withdrawn from warehouse, for consumption, and to require a cash deposit on these products equal to the net bounty or grant.

Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lamb Meat from New Zealand, 50 Fed. Reg. 37,708 (1985). The effective date of the order was September 17, 1985 and the countervailing duty rate remained at NZ\$0.3602/lb. throughout the time period covering all of the entries at issue. The first entry of lamb meat involved in the instant case was dated December 18, 1985 at which time Customs knew that the correct countervailing duty rate was NZ\$0.3602/lb.² The amount of countervailing duty actually deposited and collected by Customs, however, was only an amount equal to NZ.36 cents/lb. Customs accounts for the difference as a "mere inadvertence/oversight on the part of Customs" and the Customs team leader stated that "[h]ad my team recognized this at the time of entry, it would have rejected the entries and instructed the importer to resubmit them with the correct amount of estimated countervailing duties." Def.'s Ex. B at 2.

The Court finds that Customs had the onus of recognizing the error in the amount of duty deposited by NZL at the time of entry. Customs had a statutory obligation under § 1671e(a) and § 1671h to assess and collect the established countervailing duty deposit rate upon entry. Customs cannot avail itself of any statute that allows for absolution for their "inadvertence" or "oversight" and, therefore, the Court finds that Customs did not fulfill its mandated obligation nor did Customs prove there was an exception for doing so. Having found that Customs did commit an error in the assessment and collection of countervailing duty to be deposited, the Court now turns to the second question of whether Customs can collect interest based on its error.

II. CUSTOMS CANNOT CHARGE INTEREST BASED ON A CUSTOMS ERROR AT THE TIME OF ENTRY.

Customs relies on the countervailing duty statute to justify the assessment of interest on the difference between the amount of countervailing duty deposited and the amount that should have been deposited. The Court finds that the countervailing duty statute does not provide Customs a means of avoiding responsibility for collecting the incorrect amount of countervailing duty deposited at the time of entry of the subject goods.

Customs argues that when the amount of countervailing duty deposited is less than the amount assessed at liquidation the importer is liable for the difference together with interest. The statute reads:

If the amount of an estimated countervailing duty deposited under section 1671e(a)(3) of this title is different from the amount of the

² In the declaration of the Customs "team leader" Michael Willis, he stated that "at or about the time of entry of the items involved in this case, one or more of my team members reviewed the entry summaries covering said goods, which the team knew to be subject to estimated countervailing duties at the rate of NZ\$0.3602/lb. . . ." Def.'s Ex. B at 1.

countervailing duty determined under a countervailing duty order issued under section 1671e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption after notice of the affirmative determination of the Commission under section 1671d(b) of this title is published shall be—

(1) collected, to the extent that the deposit under section 1671e(a)(3) of this title is lower than the duty determined under the order, or

(2) refunded, to the extent that the deposit under section 1671e(a)(3) of this title is higher than the duty determined under the order,

together with interest as provided by section 1677g of this title.

19 U.S.C. § 1671f(b) (1988). Taken out of context, it would appear that Customs' reliance on the language provides for the imposition of interest on the difference of countervailing duty at issue. With the benefit of thorough evaluation however, the Court finds that Customs' argument misapplies the statute. The statute contemplates goods entered that are subject to an as yet unknown countervailing duty order. As the legislative history states:

Under section 707 of the Tariff Act of 1930, as added by the bill, the difference between the security posted under 703(d)(2) on an entry *during an investigation* and the countervailing duty imposed under section 701(a) would be (1) disregarded, if the security is less, or (2) refunded, if the security is more.

H.R. Rep. No. 261, at 59 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 445 (emphasis added). The preliminary deposit amount is the best estimate of the subsidy finding in a preliminary determination by Commerce. Once a final determination is made, Commerce orders the final countervailing duty rate. The difference between the preliminary amount and the final amount is what is contemplated by the statute. This situation was not present in the instant case. The final duty rate was established well before the first entry of the subject merchandise and the same rate applied to all of the subsequent entries in question. The countervailing duty rate remained constant and, therefore, there was no difference between the duty deposit rate and the final or liquidated duty rate. But for the Customs entry error, the duty deposit amount and the final duty amount would have been the same.

Customs also asserts that the "statutory language does not provide for any exceptions to the payment of interest." Customs cannot extend the scope of the statute to include the "inadvertence/oversight on the part of Customs." Def.'s Ex. B at 2. Had the duty rate been in flux as envisioned by the statute, Customs' argument might appertain in this case. The statute does not apply because there was no change contemplated or realized in the countervailing duty rate throughout the time period of the subject entries. Therefore, Customs' argument is misplaced and inappropriate for the conditions that exist here.

Had Customs fulfilled its obligation to assess the correct duty deposit amount, interest upon non-payment would have accrued from the time of entry. That is not what occurred in the instant case. NZL cannot be penalized for a charge assessed retroactively. As the CAFC held in this action,

We do not see how there can be a decision on a charge—at least for purposes for starting the running of a limitations period—until the party levying the charge announces that the charge is being levied and states the amount of the charge, or the method of computing the charge. In the case of interest that means there is no decision until the party being assessed either is informed of the amount of interest that is due or is told what the rate of interest to be applied against the principal amount is.

New Zealand Lamb Co., Inc. v. United States, 12 Fed. Cir. (T) ___, ___, 40 F.3d 377, 382 (Fed. Cir. 1994). The logic is applicable to the issue before this Court. The Court sees no soundness in Customs' assessment of interest on a charge that was not imposed. Without the benefit of a variable countervailing duty rate, Customs cannot avail itself of any statute that will allow the imposition of interest on a retroactively assessed charge. The Court holds that Customs cannot assess interest on the difference between the deposited countervailing duty amount and the liquidated amount based on a Customs error.

NZL requested the Court to revisit the issue of the timeliness of Customs' assessment of interest incident to liquidation. The Court does not have to reach that issue in the disposition of this action. The finding that Customs erred and cannot assess interest precludes the Court's deliberation of the subsequent events in this case.

CONCLUSION

The Court finds that Customs erred upon failing to assess and collect the proper countervailing duty deposit when the subject merchandise was entered; therefore Customs cannot assess interest on the difference between the deposited amount of duty and the liquidated amount of duty, based on a Customs error. The Court must, and does find that Customs' determination in this case was not in accordance with law. Therefore, the Court grants the plaintiff's motion for summary judgment and awards plaintiff the amount of interest paid with interest.

(Slip Op. 97-51)

BIC CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND THAI MERRY CO., LTD., DEFENDANT-INTERVENOR, AND NEW YORK LIGHTER CO., INC. AND POLYCITY INDUSTRIAL LTD., DEFENDANT-INTERVENORS

Consolidated Court No. 95-05-00726

[The ITC's negative determination as to disposable lighters from Thailand and the People's Republic of China is sustained.]

(Dated April 24, 1997)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Robin H. Gilbert, Lynn E. Duffy, and Laura A. Svat), for plaintiff.

Lyn M. Schlitt, General Counsel, James A. Toupin, Deputy General Counsel, Office of General Counsel United States International Trade Commission (Anjali K. Hansen, Shara L. Aranoff, and Rhonda M. Hughes), for defendant.

Willkie Farr & Gallagher (Kenneth J. Pierce, William B. Lindsey, and Matthew R. Nicely), for defendant-intervenor Thai Merry Co.

Pepper, Hamilton & Scheetz (Elliot J. Feldman, and John J. Burke), for defendant-intervenors New York Lighter Co.; and Polycity Industrial Ltd.

OPINION

GOLDBERG, *Judge*: This matter is before the Court on plaintiff's motion for judgment on the agency record and request for remand. Plaintiff, BIC Corporation, Milford Connecticut, ("BIC"), challenges the United States International Trade Commission's ("Commission") final negative material injury determinations with respect to certain disposable lighters from Thailand and the People's Republic of China ("China"). *Disposable Lighters from Thailand*, USITC Pub. No. 2876, Inv. No. 731-TA-701 (Apr. 1995) (final negative determination), 60 Fed. Reg. 21,007 (1995) ("*Thai Lighters*"); and *Disposable Lighters from the People's Republic of China*, USITC Pub. No. 2896, Inv. No. 731-TA-700 (June 1995) (final negative determination), 60 Fed. Reg. 32,338 (1995) ("*Chinese Lighters*"). The Court exercises jurisdiction under 28 U.S.C. § 1581(c) (1994), and affirms the Commission's final determinations.

BACKGROUND

I. *The Antidumping Petition*:

On May 9, 1994, BIC, the sole domestic producer of disposable lighters, filed a petition with the Commission and Commerce alleging that the United States's ("U.S.") disposable lighter industry was materially injured, or threatened with material injury, by reason of subsidized and less than fair value ("LTFV") imports of disposable pocket lighters from Thailand, and LTFV imports of disposable lighters from China. *Disposable Lighters from the People's Republic of China and Thailand*, 59 Fed. Reg. 25,502 (1994). *Thai Lighters* at I-8.

In April 1995, the ITC reached a final negative determination with respect to disposable lighters from Thailand. *Thai Lighters*. Two months

later, the Commission reached a final negative determination with respect to disposable lighters from China. *Chinese Lighters*.

II. The Commission's Determinations:

The Commission's determination in *Chinese Lighters* parallels its determination in *Thai Lighters*. That is, in *Chinese Lighters*, the Commission adopted and incorporated by reference the conditions of competition and the discussion of the domestic industry contained in *Thai Lighters*.¹ *Chinese Lighters* at I-7, I-9. The only significant difference involves cumulation. In *Thai Lighters*, the Commission analyzed material injury cumulating imports from both Thailand and China. *Thai Lighters* at I-11-I-13. In contrast, a majority of the Commission in *Chinese Lighters* decided not to cumulate imports from China with imports from Thailand because it found that the Thai imports were no longer subject to investigation. *Chinese Lighters* at I-7, I-11.

In both determinations, the Commission found one like product, consisting of both standard and child-resistant disposable lighters. *Thai Lighters* at I-6.

The Commission then examined the state of the domestic industry. It began by identifying two conditions of competition which provided the context for its assessment of the economic health of the domestic disposable lighter industry. The first condition of competition was a new regulation promulgated by the Consumer Product Safety Commission ("CPSC"), banning both the manufacture or importation of non-child-resistant lighters ("standard lighters") after July 12, 1994. *Id.* at I-9. The Commission determined that the ban forced the industry to undergo a "fundamental" structural change, affecting the investigation in three ways: first, it forced many suppliers to exit the U.S. market because they could not supply disposable lighters that complied with the CPSC regulation; second, it led to the buildup of U.S. inventories of domestic and imported standard lighters; and third, it complicated the use of 1994 market data. *Id.*

The second condition of competition involved a finding that the disposable lighter market consists of two primary market segments, one containing "higher-priced, higher-quality, brand name disposable lighters," and the other containing "lower-priced, lower-quality private label brands." *Id.* The Commission further found that BIC's lighters were sold in the higher-quality segment, while the subject imports were sold in the lower-quality segment. *Id.*

Against this backdrop, the Commission then discussed the state of the domestic industry. The Commission found that between 1991 and 1994, the cumulated volume of subject imports increased, and BIC's market share by quantity decreased slightly. *Thai Lighters* at I-14-I-15. Importantly, the Commission also found that any negative inferences this data might raise were offset by increased domestic consumption of lighters

¹ As a result, unless otherwise specified, all references to the Commission's discussion in *Thai Lighters* also incorporate *Chinese Lighters*.

during the same period. *Id.* Moreover, when it measured market share by value, the Commission found that BIC's market share actually increased from 1992 to 1994. *Id.* at I-15. Additionally, in the post-CPSC ban period, the Commission found that BIC's market share increased whether measured by quantity or value. *Id.*

The Commission then found that the two products competed on factors other than price. *Id.* at I-15-I-16. Consequently, the Commission concluded that "[t]he domestic industry retained a relatively stable share (by value) of a growing market, and was profitable throughout most of the period of investigation, even though domestic production decreased." *Thai Lighters* at I-17 (footnotes omitted). As a result, the Commission unanimously determined that the domestic industry was not experiencing material injury by reason of the LTFV imports from Thailand and China.

The Commission then turned to the question of whether the subject imports threatened the domestic industry with material injury. A majority of the Commission first concluded that after the CPSC ban, "only the Thai and Chinese existing and future capacity to produce child-resistant lighters [would be] evidence of any threat of material injury to the domestic industry." *Id.* at I-20. It then found that, as a percentage of total capacity, the Thai and Chinese producers' capacity to produce child-resistant lighters was too small to pose a threat to BIC. *Id.* at I-20-I-21.

The majority further found that the administrative record did not contain any evidence indicating that the Thai and Chinese producers were "preparing to abandon [] other markets, which consume standard lighters, in order to ship more child-resistant lighters to the United States." *Id.* at I-21. As a result, the majority concluded that there was no evidence "that any threat of material injury [was] real or that actual injury [was] imminent."² *Id.*

STANDARD OF REVIEW

The Court will uphold the Commission's determination unless it finds that it is "unsupported by substantial evidence on the record, or not otherwise in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citations omitted).

To make this assessment, the Court reviews "all information presented to or obtained by the * * * Commission during the course of the administrative proceeding * * *." 19 U.S.C. § 1516a(b)(2)(A)(I). Importantly, the Court may not remand the Commission's determination simply because the evidence on the record may support two inconsistent conclusions. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620

²In *Thai Lighters*, Commissioner Lynn M. Bragg concurred with the majority but wrote separately to discuss her analysis. *Thai Lighters* at I-25-I-27. In both *Thai Lighters* and *Chinese Lighters*, Commissioners David B. Rohr and Don E. Newquist did not join the majority's determination because they determined that the domestic industry was threatened with material injury by reason of the subject imports. See *Thai Lighters* at I-29-I-37; and *Chinese Lighters* at I-21-I-28.

(1966); *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984); accord, *Mitsubishi Materials Corp. v. United States*, 20 CIT ___, ___, Slip Op. 96-44 at 5 (Feb. 29, 1996). Rather, the choice between two possible conclusions is properly the task of the Commission, and not the court. *Bando Chemical Indus. v. United States*, 17 CIT 798, 802-03 (1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994); *Acciai Speciali Terni S.p.A. v. United States*, 19 CIT ___, ___, Slip Op. 95-142 at 8-9 (Aug. 7, 1995). Thus, the Court affirms agency factual determinations so long as they are reasonable and supported by the record when considered as a whole, even though there may be evidence on the record which detracts from the agency's conclusions. *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 137-38, 744 F.2d 1556, 1563 (1984).

DISCUSSION

BIC challenges the Commission's negative current injury determinations and negative threat determinations in both *Thai Lighters* and *Chinese Lighters*. With respect to the current injury determinations, BIC argues that the Commission's causation analysis is not in accordance with law because it is internally inconsistent and it is unsupported by substantial evidence on the record. BIC further asserts that the Commission ignored evidence of underselling, overstated the impact of the CPSC ban, and relied on flawed and unrepresentative data.

With respect to the threat determinations, BIC argues that the majority of the Commission ignored evidence of rapidly increasing subject imports, and evidence that Thai and Chinese producers planned to convert standard lighter capacity to child-resistant lighter capacity. BIC further asserts that the ITC ignored evidence of adverse price trends for child-resistant lighters, and growing inventories of subject lighters.

Finally, BIC asserts that the majority of the Commission erred in *Chinese Lighters* when it refused to cumulate imports from Thailand with imports from China. The Court will address each of these contentions in turn.

I. The Commission's Current Injury Determinations:

A. The Commission's Causation Analysis:

BIC attacks the Commission's causation analysis on two levels: one legal, the other factual. First, BIC argues that the Commission cannot legally justify its apparently inconsistent findings. BIC points out that the Commission found *sufficient fungibility* between the subject imports and BIC's lighters to support its finding of one like product, as well as its decision to cumulate. Yet, the Commission also found that there was *insufficient fungibility* between the two groups of lighters to negatively affect domestic prices and production. BIC asserts that such contradictory findings cannot pass legal muster. Second, BIC contends that substantial evidence on the record fails to support the division of the disposable lighter market into low- and high-end product lines. Thus, according to BIC, the Commission's causation analysis is unsupported by

substantial evidence on the record because it is predicated on this division.

1. *Whether the Commission's Causation Analysis is in Accordance with Law:*

BIC asserts that "any evidence of competition between the imported and domestic like product" legally prevents the Commission from segmenting the domestic market when it assesses causation. *Pl.'s Br.* at 19. According to BIC, the Commission's finding of one like product and its decision to cumulate constitute such evidence of competition. *See Thai Lighters* at I-6, I-12-I-13. Relying on *Grupo Indus. Camesa v. United States*, 18 CIT 461, 853 F. Supp. 440 (1994), and *Encon Indus., Inc. v. United States*, 16 CIT 840 (1992), BIC then concludes that the Commission's causation analysis was not in accordance with law.

Plaintiff's arguments miss their mark: how the Commission analyzes competition in the contexts of like product and cumulation does not legally dictate how the Commission must analyze competition in the context of causation.

The Court initially notes that in previous determinations, the Commission has recognized market segments as a condition of competition, notwithstanding concurrent findings of a single like product. *See, e.g., Certain Calcium Aluminate Cement and Cement Clinker From France*, USITC Pub. No. 2772, at I-11, Inv. No. 731-TA-645 (May 1994) (final negative determination); *New Steel Rails From the United Kingdom*, USITC Pub. No. 2617, at 10, Inv. No. 731-TA-559 (Mar. 1993) (final negative determination).

Importantly, "neither the governing statute nor its legislative history require the Commission to adopt any particular analysis when the market consists of several segments." *Copperweld Corp. v. United States*, 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988). Hence, when it has reviewed determinations in which the Commission has considered using market segments, the court has deferred to the Commission's findings regarding the existence and importance of such segments. *See, e.g., Acciai Speciali*, 19 CIT at ___, Slip Op. 95-142 at 25-26 (upholding the Commission's decision not to invoke market segments in its causation analysis even though market segments were decisive in its cumulation analysis).

Indeed, BIC ignores previous cases in which the court has consistently recognized that the Commission's inquiry into product substitutability, i.e., to what degree two or more products compete with each other, may differ according to context:

Analysis of substitutability varies according to the context of its application. For the purposes of defining "like product" as described in 19 U.S.C. § 1677(10)(1988), it is not necessary that like products be completely substitutable, only that the like product be like, or in the absence of like, most similar in characteristics and uses. For purpose of cumulation, the analysis of substitutability is also not stringent, as only a reasonable overlap in competition is required

where like product imports compete with each other and with like products of the domestic industry. In analysis of material injury, substitutability is one factor in the evaluation of volume and price.

R-M Indus., Inc. v. United States, 18 CIT 219, 226 n.9, 848 F. Supp. 204, 210 n.9 (1994) (citations omitted) (internal quotations omitted). See also *United States Steel Group-A Unit of USX Corp. v. United States*, 18 CIT 1190, 1216, 873 F. Supp. 673, 697 (1994); *Acciai Speciali*, 19 CIT at ___, Slip Op. 95-142 at 35 (citation omitted).

Moreover, contrary to BIC's contentions, neither *Grupo*, 18 CIT 461, 853 F. Supp. 440, nor *Encon*, 16 CIT 840, suggest that the Court should accord less deference to the Commission's determinations in the present case. In *Grupo*, the court evaluated whether substantial evidence supported the Commission's decision to reject market segments both as a condition of competition, and as a factor in its causation analysis. 18 CIT at 464-66, 853 F. Supp. at 443-45. The court affirmed the Commission's decisions because the Commission had made findings of a high degree of fungibility. 18 CIT at 465-66, 853 F. Supp. at 445. In the present case, there are no such findings. *Thai Lighters* at I-13 (noting that the evidence indicates that the subject imports and domestic product have "somewhat limited fungibility").

Likewise, *Encon* fails to support BIC's argument. On its facts, *Encon* is unlike the present case. In *Encon*, the court upheld an affirmative injury determination involving electric ceiling fans. 16 CIT at 840. The importer challenged the determination, arguing that the Commission should have determined "whether low-end imports injured a 'major portion' of the total domestic industry by examining the effects on individual producers." *Id.* Like the present case, the U.S. ceiling fan market consisted of both low- and high-end products. *Id.*; *Thai Lighters* at I-9. However, unlike the present case, in *Encon* the domestic industry consisted of both low- and high-end producers. 16 CIT at 840. Here, the Commission determined that BIC is the sole domestic producer of disposable lighters, and that it only produces high-end lighters. *Thai Lighters* at I-8-I-9. As a result, the only possible domestic like product were those produced by BIC.

Hence, the Court concludes that the Commission's findings regarding fungibility as they relate to like product, cumulation, and causation accord with law.

2. Whether the Commission's Causation Analysis is Supported by Substantial Evidence on the Record:

As a condition of competition, the Commission determined that the U.S. disposable lighter market consisted of two major market segments. Specifically, it found that higher-priced, higher-quality, brand name disposable lighters were concentrated at one end of the market, and that lower-priced, lower-quality private label disposable lighters were concentrated at the other. *Thai Lighters* at I-9. The Commission further found that BIC's lighters were in the higher-quality category, and that the subject imports were in the lower-quality category. *Id.*

BIC argues that substantial evidence on the record does not support these findings. BIC challenges these findings on three separate grounds. First, BIC contends that the Commission's market segment findings are based solely on quality differences, and that quality differences alone do not constitute substantial evidence "that products do not compete with each other." *Pl.'s Br.* at 24-25. Second, BIC argues that the evidence that the Commission relied on to support its like product and cumulation findings overwhelm the evidence that the Commission relied on to support its causation findings. *Id.* at 26-31. Third, BIC claims that the Commission ignored other evidence on the record which suggested that the subject imports compete with BIC's lighters. *Id.* at 31-33. The Court is unpersuaded by these arguments and addresses each of them in turn.

(a) Quality Differences:

The Commission decided to discount evidence of underselling because it determined that the subject imports and the domestic products were concentrated in different segments of the disposable lighter market. *Thai Lighters* at I-15-I-16. In order to reach this decision, the Commission evaluated evidence that BIC's lighters have a reputation for quality and safety, and benefit from advertizing, promotional support, and brand name recognition. *Id.* (citing *Conf. Staff Rpt.* at I-35, I-80, I-83-I-85; *Pub. Staff Rpt.* at II-17, II-29-II-31). The Commission also weighed the subject imports' features, such as shape, adjustable flame settings, and transparent fuel tanks, against BIC's greater fuel capacity and superior fuel efficiency. *Id.* The Commission further noted that, although two-thirds of responding purchasers stated that there were no significant quality differences between the subject imports and BIC, one-half of these purchasers nevertheless reported some quality differences. *Id.* at I-12 (citing *Conf. Staff Rpt.* at I-84-I-85; *Pub. Staff Rpt.* at II-31).

Based on evidence contained in the purchaser responses, the Commission found that factors other than price influenced 80% of the purchasers. These non-price factors include: product quality, supplier liability insurance, brand name recognition, credibility/reliability of supplier, customer preference, availability, incentives, packaging, supplier service, and support. *Conf. Staff Rpt.* at I-99; *Pub. Staff Rpt.* at II-35.

BIC claims that these findings do not support the Commission's negative injury determination because "competition exists between products of differing quality." *Pl.'s Br.* at 25. Yet, BIC forgets that the court does not require the Commission to find a total absence of competition between the domestic like product and the subject imports before it may discount evidence of underselling.

Instead, the court has consistently recognized that the Commission may discount evidence of underselling whenever it finds that the subject imports compete with the domestic like product on other factors besides price. See *General Motors Corp. v. United States*, 17 CIT 697, 706, 827 F. Supp. 774, 783-84 (1993); *R-M Indus.*, 18 CIT at 226-28, 848 F. Supp. at 210-11; *Gifford-Hill Cement Co. v. United States*, 9 CIT 357, 368-69,

615 F. Supp. 577, 586 (1985). As discussed *infra*, the Court finds that substantial evidence on the record supports the Commission's findings that non-price factors mitigated price competition.

(b) Evidence of Competition Incorporated into the Commission's Like Product and Cumulation Findings:

As previously noted, the Commission found sufficient fungibility between the subject imports and BIC's lighters to support its like product and cumulation findings. *Thai Lighters* at I-6, I-12-I-13. BIC now attempts to use these findings to impugn the Commission's causation analysis on an evidentiary level. According to BIC, the evidence on competition and fungibility which underpins the like product and cumulation findings is so strong that it should have resulted in an affirmative injury determination. *Pl.'s Br.* at 26-31.

Yet, this argument fails because BIC again overlooks the importance of context; like product, cumulation, and causation are functionally different inquiries because they serve different statutory purposes. *R-M Indus.*, 18 CIT at 226 n.9, 848 F. Supp. at 210 n.9. As a result, each inquiry requires a different level of fungibility. Hence, the record may contain substantial evidence that two products are fungible enough to support a finding in one context (e.g., one like product), but not in another (e.g., cumulation or causation). *Acciai Speciali*, 19 CIT at ___, Slip Op. 95-142 at 35; *Certain Steel Wire Rod from Brazil and Japan*, USITC Pub. No. 2761, at I-6-I-8, I-21-I-22, Inv. Nos. 731-TA-646 and 731-TA-648 (Mar. 1994) (final negative determination) ("*Steel Wire Rod from Brazil and Japan*"). Such a situation does not necessarily render either of the two apparently inconsistent findings unsupported by substantial evidence.

More concretely, the purpose of the like product inquiry is to delimit the domestic industry that the Commission will examine in its material injury determination. S. Rep. No. 96-249 at 90-91 (1979), *reprinted in*, 1979 U.S.C.C.A.N. 381, 476-77. It is not unusual for the Commission to find one like product even though it includes individual products that either lack or have limited fungibility. See *Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide From the Netherlands*, USITC Pub. No. 2783, at I-6-I-7, Inv. No. 731-TA-652 (June 1994) (final affirmative determination); *Steel Wire Rod from Brazil and Japan* at I-6-I-8; *Steel Wire Rope From The Republic of Korea and Mexico*, USITC Pub. No. 2613, at 9-10, Inv. Nos. 731-TA-546 and 731-TA-547 (Mar. 1993) (final affirmative determination). Hence, a finding of one like product is not synonymous with a finding that two products are highly fungible. *Acciai Speciali*, 19 CIT at ___, Slip Op. 95-142 at 35 (citations omitted).

Likewise, cumulation does not require two products to be highly fungible. Rather, to support a decision to cumulate, the Commission need only find a "reasonable overlap" of competition between the subject imports, and between the subject imports and the domestic like product. See, e.g., *U.S. Steel Group*, 18 CIT at 1199-200, 873 F. Supp. at 685 (citations omitted). Fungibility is only *one* of four factors that the Commis-

sion considers when it decides whether a reasonable overlap of competition exists. *Czestochowa v. United States*, 19 CIT ____, 890 F. Supp. 1053, 1062 (1995) (citations omitted). In this case, the Commission decided to cumulate despite its findings that the subject imports and the domestic product were only "somewhat fungible." *Thai Lighters* at I-13.

Nevertheless, BIC argues that other language in the cumulation discussion suggests that the subject imports and the domestic product are fungible. *Pl.'s Br.* at 29 (citing *Thai Lighters* at I-13). Importantly, however, fungibility plays a far more important role in the causation context than in either the like product or cumulation contexts; the more fungible two products are, the more likely underselling by one will affect the price of the other. *General Motors*, 17 CIT at 711-12, 827 F. Supp. at 787-88 (citing *Negev Phosphates, Ltd. v. U.S. Dep't of Commerce*, 12 CIT 1074, 1084, 699 F. Supp. 938, 947; H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979)).

Different features, consumer perceptions of quality and reliability, price differences, and brand loyalty all affect how fungible two products are, and hence, whether underselling by one product will suppress or depress the price of the other. *General Motors*, 17 CIT at 707-10, 827 F. Supp. at 784-87. In the present case, the Commission found that the subject imports did not depress the price of domestic lighters because the imported lighters did not enjoy the same brand name recognition, or reputation for quality and safety as BIC's lighters. *Thai Lighters* at I-15-I-16. See also *Disposable Lighters From the People's Republic of China and Thailand: Hearings Before the United States International Trade Commission* [hereinafter "*Tr'g Tr.*"] 127-29 (1995) (testimony of James Wilson). The Court concludes that these findings do not contradict the concurrent findings contained in the Commission's like product and cumulation discussions.

(c) Other Evidence on the Record:

Highlighting certain importer and purchaser questionnaire responses, BIC further argues that the Commission ignored evidence on the record indicating that the subject imports and BIC lighters are both comparable in quality and interchangeable. *Pl.'s Br.* at 31-33. The Court remains unpersuaded.

The inquiry into whether a set of products is comparable is a fact intensive one. *Iwatsu Electric Co. v. United States*, 15 CIT 44, 57, 758 F. Supp. 1506, 1517 (1991). Often, there may be substantial evidence on the record to support several inconsistent conclusions. *Metallwerken Nederland B.V. v. United States*, 13 CIT 1013, 1017, 728 F. Supp. 730, 734 (1989) (citing *Consolo*, 383 U.S. at 620; *Matsushita*, 3 Fed. Cir. (T) at 51, 750 F.2d at 933; *Negev Phosphates*, 12 CIT at 1076-77, 699 F. Supp. at 942; *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1210, 704 F. Supp. 1075, 1088 (1988)). Consequently, because of its role as fact-finder, the Commission "has great latitude in making [these] finding[s]." *Iwatsu*, 15 CIT at 57, 758 F. Supp. at 1517. Hence, although BIC correct-

ly notes that other evidence indicates that the subject imports compete with its products, the Court finds this evidence insufficient to render the Commission's determination unsupported by substantial evidence on the record.

The record reveals that purchasers infrequently change suppliers, and that many customers prefer BIC lighters because they enjoy a reputation for safety and a brand name recognition unmatched by the subject lighters. *See* List 2, Docs. 58.72, 58.74, 58.83, 58.87, 58.89, 58.98 (purchaser's questionnaire responses); *Final Econ. Mem.* at 21-23, List 2, Doc. 45; *Pub. Staff Rpt.* at II-30-II-31.

Furthermore, the majority of responding purchasers reported that the lowest priced lighters do not always win a contract or sale. *See* List 2, Docs. 58.72, 58.74, 58.83, 58.87, 58.89, 58.98 (purchaser's questionnaire responses); *Final Econ. Mem.* at 21-23. Instead, these purchasers evaluate the following non-price factors when they decide which lighters to purchase: product quality, supplier liability insurance, brand name recognition, the reliability of the supplier, customer preference, availability, incentives (e.g., advertising and free goods), packaging, and supplier service and support. *Id.*

Evidence in the record also indicates that, for the most part, subject imports and domestic lighters are not distributed through the same channels. Rather, the low-end imported lighters are more commonly sold to street vendors or "mom and pop" convenience stores, while BIC sells significantly more lighters to retail chains. *Hr'g Tr.* at 114 (testimony of John Norstrom); *Hr'g Tr.* at 122 (testimony of John Tucker); *Hr'g Tr.* at 134 (testimony of Richard D. Boltuck).

Hence, the Court finds that, notwithstanding the questionnaire responses isolated by BIC, substantial evidence on the record supports the Commission's causation findings.

B. The Commission's Underselling Analysis:

When it assessed whether the subject imports caused material injury, the Commission decided to discount evidence that subject imports consistently undersold the domestic like product. *Thai Lighters* at I-16. BIC now challenges this aspect of the determination, arguing that "evidence of underselling is an indicator *per se* of injury by reason of subject imports." *Pl.'s Br.* at 35. According to BIC, once the Commission acknowledged that the subject imports undersold BIC's lighters, it was legally bound to make an affirmative injury determination unless it could quantify a price premium. The Court finds this analysis unpersuasive.

Evidence of underselling alone is legally insufficient to support an affirmative injury determination. Rather, the Commission has a statutory mandate to consider not only whether the subject imports have significantly undersold the domestic like product, but also how the subject imports affect the prices of the domestic like product. *See* 19 U.S.C. § 1677(7)(C)(iii). Interpreting this provision, the court has previously noted that Congress has vested the Commission with broad discretion to analyze and to assess the significance of all relevant factors in its injury

determination. *USX Corp. v. United States*, 12 CIT 844, 846, 698 F. Supp. 234, 237 (1988) (citing *Copperweld*, 12 CIT at 156, 682 F. Supp. at 564; *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985)). See also *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 386, 401-03, 741 F. Supp. 921, 934-35 (1990).

The Court now finds that the Commission permissibly exercised its discretion, and that substantial evidence on the record supports its decision to discount the evidence of underselling. First, the Commission explicitly considered evidence on the record regarding the margins of underselling. *Thai Lighters* at I-15.

Second, the Commission determined that the margins were consistent with its finding of no material injury because the subject imports and the domestic like product were concentrated in different market segments. In deciding to discount, the Commission noted that:

Standard lighters in the high-end segment typically range between 30 cents and 40 cents per lighter. Prices in the low-end segment vary from 10 cents to 20 cents per lighter. The disposable lighters selling at the high end [sic] of the market enjoy brand name recognition, as well as a reputation for quality and safety that is not characteristic of the lower-priced imports * * *. Purchasers agree that the primary advantage of the domestic product is its quality, brand name recognition and its advertising/promotional support. We discount the significance of underselling for these reasons.

Thai Lighters at I-15-I-16 (footnotes omitted).

The Court finds this explanation reasonable. As previously noted, different features, consumer perceptions of quality and reliability, price differences, and brand loyalty can all affect to what extent the price of the subject imports affects the price of the domestic like product. *General Motors*, 17 CIT at 707-10, 827 F. Supp. at 784-87. See also *R-M Indus.*, 18 CIT at 226-28, 848 F. Supp. at 210-11. Here, it was precisely these types of factors that the Commission weighed when it decided to discount evidence of underselling. *Thai Lighters* at I-15-I-16. Moreover, as discussed in the preceding subsection, the record supports the Commission's decision to evaluate these non-price factors. See List 2, Docs. 58.72, 58.74, 58.83, 58.87, 58.89, 58.98 (purchaser's questionnaire responses); *Final Econ. Mem.* at 21-23.

Third, contrary to BIC's contentions, the Commission was not required to quantify a price premium before it could discount the importance of the underselling margin. While BIC correctly notes that in *Canned Pineapple Fruit from Thailand*, USITC Pub. No. 2907, Inv. No. 731-TA-706 (July 1995) (final affirmative determination) ("*Canned Pineapple*"), the Commission quantified price premiums when it evaluated the domestic canned pineapple market, neither agency practice nor case law compels it to do so in every investigation.³ Instead, the court has previously upheld determinations in which the Commission has dis-

³ Note also that in *Canned Pineapple*, the Commission undertook a market segment analysis despite a concurrent finding of one like product, consisting of domestic canned pineapple fruit. *Canned Pineapple* at I-7-I-8, I-13-I-14.

counted evidence of underselling based on unquantified price premiums. See *Fresh Cut Roses From Colombia*, USITC Pub. No. 1575, at 9-10, Inv. No. 731-TA-148 (Sept. 1984) (final negative determination), *aff'd*, *Roses, Inc. v. United States*, 13 CIT 662, 665-66, 720 F. Supp. 180, 183 (1989); *R-M Indus.*, 18 CIT at 226-28, 848 F. Supp. at 210-11.

Thus, in light of the foregoing, the Court upholds the Commission's underselling analysis because it is both in accordance with law and supported by substantial evidence.

C. The Commission's Analysis of the CPSC Ban:

The Commission identified the CPSC's ban on standard lighters as a condition of competition because it concluded that the ban fundamentally altered the domestic disposable lighter market. *Thai Lighters* at I-9. BIC now challenges this conclusion, arguing that the Commission wrongly assumed both that the ban excluded subject imports from the U.S. market, and that the ban afforded BIC a competitive advantage. According to BIC, these flawed assumptions force this Court to find that the Commission's causation analysis is unsupported by substantial evidence on the record. *Pl.'s Br.* at 42-49. The Court disagrees.

BIC concedes that the Commission correctly found that the CPSC ban excluded many suppliers from the U.S. market. See *Pl.'s Br.* at 42; *Thai Lighters* at I-9 n.37. However, according to BIC, these suppliers did not import or produce the majority of the subject lighters. As a result, BIC argues that the most important foreign suppliers continued to participate in the U.S. market despite the ban. *Pl.'s Br.* at 42-46.

BIC's attack is without consequence. The record contains ample evidence that the ban decreased the number of suppliers who could ship to the U.S. See List 2, Docs. 58.23, 58.32, 58.38, 58.42, 58.49, 58.107 (importers' questionnaire responses); List 2, Docs. 58.61, 58.71 (purchasers' questionnaire responses). BIC has not adduced evidence that the remaining suppliers, albeit important ones, were capable of supplying enough child-resistant lighters to fully offset the effect of the ban on standard lighters. The Court concludes that substantial evidence on the record supports the Commission's finding that the ban had the immediate effect of decreasing the number of suppliers.⁴

The Court further concludes that substantial evidence on the record also supports the Commission's statement that "BIC [was] well-positioned to compete" in the post-ban domestic lighter market. *Thai Lighters* at I-19. This statement merely reflects the Commission's findings that in the second half of 1994, BIC's child-resistant lighters showed strong gains, including an improved operating income. *Id.* Because there is substantial evidence on the record to support these findings, see *Conf. Staff Rpt.* at A-11-12, the Court finds BIC's challenges to be without merit.

⁴The Court discusses whether the Commission correctly assessed how the CPSC ban affected future foreign capacity *infra*.

D. The Commission's Use of Allegedly Flawed and Unrepresentative Data:

BIC challenges how the Commission used data on two levels. First, BIC contends that the Commission failed to assess economic data for the entire period of investigation, and instead focused on data for the second half of 1994. Second, BIC contends that the Commission used inaccurate data for imports of child-resistant lighters. The Court rejects these contentions and addresses each in turn.

1. Full Period of Investigation and Half-Year Data:

According to BIC, the Commission focused on post-CPSC ban trends while ignoring "the transitory and unique nature of the period surrounding the ban." *Pl.'s Br.* at 50. The Court rejects this argument for two reasons.

First, the Commission explicitly stated that it considered data for the entire period of investigation. *See Thai Lighters* at I-9. In particular, the Commission focused on data for the years 1991 through 1994 when it evaluated market share, the volume of shipments, and price. *Id.* at I-14-I-17.

Second, the record demonstrates that the Commission parsed the 1994 data into pre- and post-ban periods precisely because it recognized that the ban caused market anomalies which rendered full year comparisons problematic. *Id.* at I-9, I-15, I-17-I-19. BIC now argues that despite its parsing of data, the Commission still failed to adequately account for the market anomalies. In particular, BIC contends that the Commission ignored how industry-wide pre-ban stockpiling of standard lighters distorted market share data for Chinese and all other disposable lighters both before and after the ban.

According to BIC, anticipation of the CPSC ban on standard lighters spawned a surge in imports of standard lighters. This surge, in turn, increased the apparent market share of imported lighters before the ban. Then, in the period immediately after the ban took effect, these same importers reduced their shipments of child-resistant lighters until the stockpiles of standard lighters were depleted. This, in turn, decreased apparent market share of imported lighters. As a result, according to BIC, when the Commission compared the imported lighter's pre-ban market share with their post-ban market share, the Commission overstated both the imported lighter's loss and BIC's gain in market share after the ban took effect. *Pl.'s Br.* at 51-54.

The record simply does not support BIC's contention. Rather, it reveals that the Commission was well aware that before the CPSC ban, both BIC and the foreign suppliers increased their inventories of standard lighters. *See Thai Lighters* at I-9. BIC merely posits an alternative interpretation of the market share data in the pre- and post-ban periods. The fact that evidence on the record also supports this interpretation is "neither surprising nor persuasive." *Matsushita*, 3 Fed. Cir. (T) at 54, 750 F.2d at 936. It does not render the Commission's determinations invalid.

Furthermore, BIC's contention does not implicate the Commission's findings regarding the CPSC ban as they relate both to the number of foreign suppliers and to BIC's economic performance. As discussed in the preceding section, substantial evidence supports the Commission's findings that, as a result of the ban, fewer foreign suppliers could compete in the domestic lighter market. The record also supports the Commission's findings that BIC's operating income for standard lighters peaked in the first half of 1994, even though BIC's market share was at its lowest point during the entire period of investigation.

2. Child-Resistant Lighter Import Data:

BIC further attacks the Commission's use of 1994 import data for Chinese and "[o]ther [s]ource" lighters. *Pl.'s Br.* at 56-60. Both BIC and the Commission agree that questionnaire data for these importers was incomplete. *See Pl.'s Br.* at 57; *Conf. Staff Rpt.* at I-65. As a result, the Commission was forced to use import statistics provided by Commerce to calculate market share. However, because the import data did not delineate between standard and child-resistant lighters, the Commission was forced to estimate what percentage of the imported lighters were standard and what percentage of the imported lighters were child-resistant. *Conf. Staff Rpt.* at I-65, I-73, Tbl. 3, source note.⁵

BIC argues that the Commission miscalculated the percentages for July 1994. BIC contends that because the ban on standard lighters did not take effect until July 12, 1994, there were "massive last minute entries" of standard lighters imported into the U.S. between July 1 and July 11, 1994, which distorted the relative market share data for standard and child-resistant lighters. *Pl.'s Br.* at 57. The Court rejects this argument.

The Court notes that because Congress has granted the Commission broad discretion to choose its methodology, it will not disturb the Commission's choice unless it is unreasonable. *Cemex, S.A. v. United States*, 16 CIT 251, 255-56, 790 F. Supp. 290, 294-95 (1992). BIC concedes that questionnaire data for these countries was inadequate, and that Commerce's import data did not disaggregate either by week or by type of lighter. *Pl.'s Br.* at 57. Under these circumstances, the Court finds that the Commission's methodology for allocating the lighters is reasonable.⁶

⁵The Commission used two different methods to allocate imports to the categories of standard or child-resistant. If it had data available from importers' questionnaire responses, the Commission divided the imports for the second half of 1994 using a ratio of child-resistant to standard based on the questionnaire responses. Absent questionnaire responses, the Commission assigned all imports to the standard category for the years 1992 through June 1994, and to the child-resistant category for July-December 1994. *Conf. Staff Rpt.* at I-65.

⁶Although BIC cites with approval to the methodology employed by Commissioner Crawford, *Pl.'s Br.* at 58-59, the Court finds it significant that Commissioner Crawford used it to reach a negative determination. *See Thai Lighters*.

II. *The Commission's Threat of Material Injury Determinations:*

After examining the statutory factors relevant to a threat investigation,⁷ the majority of the Commission found that the subject imports did not threaten BIC with material injury. *Thai Lighters* at I-20-I-23. BIC attacks the majority's negative determination in four ways. First, it argues that the majority ignored evidence that, notwithstanding the CPSC ban, the number of subject imports were rapidly increasing. *Pl.'s Br.* at 61-64. Second, BIC argues that the majority wrongly assessed the subject importers' capacity to produce child-resistant lighters. *Id.* at 64-75. Third, BIC argues that the majority ignored record evidence on the price of the subject imports which BIC alleges indicates that the subject imports had the potential to depress or suppress the prices of its lighters. *Id.* at 75-78. Fourth, and finally, BIC argues that the majority ignored evidence that inventories of subject imports were high, and that they posed a threat of material injury to BIC. *Id.* at 78-80. The Court is unpersuaded by these challenges and addresses each of them in turn.

A. Import Market Share Before and After the CPSC Ban:

BIC argues that the Commission ignored two trends involving the level of subject imports: first, the subject imports' increased market penetration for all disposable lighters during the entire period of investigation; and second, the increased level of child-resistant subject lighters shipped after the ban. According to BIC, both trends indicate that the subject imports threaten it with material injury. *Pl.'s Br.* at 61-64.

However, the Court cannot agree with BIC that the majority of the Commission simply ignored the market penetration of all disposable lighters, including standard, over the entire period of investigation. Rather, the majority concluded that because the CPSC regulation banned the importation or production of standard lighters, "only * * * existing and future capacity to produce child-resistant lighters is evidence of any threat of material injury to the domestic industry." *Thai Lighters* at I-20. The Court finds this explanation reasonable.

Furthermore, the Court disagrees with BIC's interpretation of post-ban import data which, according to BIC, reveals exponential and threatening increases in shipments of subject child-resistant lighters. *Pl.'s Br.* at 62-63. The Court finds it is neither surprising, nor informative, that after the ban on standard lighters took effect, subject importers ceased shipping standard lighters and, instead, began shipping child-resistant lighters. This shift resulted in a dramatic increase in child-resistant lighter imports only because subject importers shipped negligible levels of child-resistant lighters before the ban. *Conf. Staff Rpt.* at D-11.

⁷ These factors include: any existing unused production capacity, or an imminent, substantial increase in production capacity; a significant rate of increase of the volume or market penetration of imports which suggests that a substantial increase of imports is likely; whether the imports are entering the United States at prices which are likely to significantly depress or suppress the price of the domestic product; the inventory levels of the subject merchandise; and any potential for the subject importers to shift production away from other goods into the production of the subject imports. 19 U.S.C. § 1677(7)(F)(i).

In addition, the increase of child-resistant lighter shipments alone fails to show how the number of child-resistant lighters shipped after the ban compares with the number of standard and child-resistant lighters shipped before the ban. Importantly, the majority found that "even if all child-resistant capacity [were] used to produce products shipped to the United States, fewer lighters could be shipped in terms of volume and market share" than prior to the ban. *Thai Lighters* at I-21. Against this backdrop, the Court finds that the majority's decision to focus on foreign capacity instead of import levels was entirely reasonable.

B. Foreign Capacity to Produce Child-Resistant Lighters:

BIC contends that the majority of the Commission underestimated the subject producers' capacity to ship child-resistant lighters because it ignored evidence that these producers could easily convert their production lines from standard lighters to child-resistant lighters, and because the majority ignored evidence that these producers intended to increase their production of child-resistant lighters. *Pl.'s Br.* at 64-75.

Yet, BIC overlooks the relevant legal standard for threat determinations: the Commission may not make an affirmative threat determination unless there is evidence that the "threat of material injury is real and that actual injury is imminent." 19 U.S.C. § 1677(7)(F)(ii). Conjecture and speculation are not enough; there must be "positive evidence tending to show an intention to increase levels of importation." *Metalwerken Nederland B.V. v. United States*, 14 CIT 481, 488, 744 F. Supp. 281, 287 (1990) (citations omitted). The Court concludes that the majority correctly applied this standard, and that BIC's contentions are, therefore, without merit.

Although the production process for standard and child-resistant lighters is basically the same, substantial evidence on the record supports the majority's finding that it "would be speculative" to conclude conversion of a large volume of standard lighter production capacity is imminent. *Thai Lighters* at I-7, I-21. Before a standard lighter producer can convert its facilities to child-resistant lighters, it must overcome a number of technical hurdles. It must create, patent, and test a new design. Next, it must obtain CPSC approval. Only then can it modify and retool equipment on the assembly line, and begin to produce, package, and market the new lighter. *Thai Lighters* at I-21 n.145; *Hr'g Tr.* at 140 (testimony of Lindsay Meyer); *Hr'g Tr.* at 167 (testimony of Elliot Feldman). This process is both costly and time consuming. For instance, BIC spent seven years and approximately twenty-two million dollars to develop and manufacture its Child Guard Lighter. See List 2, Doc. 25 at Ex. 4, p. 4 (*Pre-Hr'g Br. for Thai Merry Co., Ltd.*) (excerpts from BIC Corp. Market Study, 1993). This suggests that conversion for many subject producers is not imminent.

In addition, BIC has not adduced evidence that those subject producers who already have the ability to produce child-resistant lighters intend to increase their production of these lighters. Instead, it merely asserts that several major subject producers ship child-resistant light-

ers to the United States, and that data on Chinese shipments of child-resistant lighters is incomplete. Neither of BIC's arguments merit a remand.

The majority clearly considered to what extent subject producers evidenced an intent to increase shipments to the United States. *Thai Lighters* at I-21. In so doing, it evaluated whether any evidence demonstrated that these producers were preparing to abandon other markets in order to increase their ability to produce child-resistant lighters. *Id.* In particular, it evaluated how Argentina's and the European Union's dumping findings against disposable lighters from China and Thailand would affect imports to the United States. *Id.* at I-22. Only then did it conclude that the record contained no evidence that "either conversion or certification is imminent." *Id.*

C. Price of Subject Child-Resistant Lighter Imports:

BIC contends that the majority of the Commission ignored evidence that child-resistant lighters from Thailand and China undersold its child-resistant lighters, and that this evidence indicated that the subject imports "had and would continue to place dramatic downward price pressure on the U.S. market." *Pl.'s Br.* at 77. The Court disagrees.

Referencing the Commission's discussion of the effect of subject imports on domestic prices, the majority reiterated that the price of subject imports did not depress or suppress the price of BIC lighters. *Thai Lighters* at I-22. Hence, the majority did not ignore evidence of underselling, it merely discounted it. As discussed in the preceding section, the Court finds that the decision to discount this evidence is both in accordance with law and supported by substantial evidence on the record.

D. Inventories of Subject Imports:

BIC argues that the majority ignored evidence indicating that inventories for subject lighters in general, and for child-resistant lighters in particular, increased over the period of investigation. *Pl.'s Br.* at 78-80. The Court disagrees.

Although BIC correctly points out that ultimately the majority chose not to evaluate inventory levels of *all* subject lighters over the entire period of investigation, the Court finds BIC's challenge immaterial. As discussed in subsection II-A, *supra*, the Court has already concluded that the majority's decision to focus solely on foreign capacity to ship child-resistant lighters is reasonable.

The Court also upholds the majority's decision to discount the importance of child-resistant lighter inventories. Before it made its negative threat determination, the majority assessed and weighed evidence on a number of factors, including child-resistant inventory levels. *Thai Lighters* at I-20; 19 U.S.C. § 1677(7)(F)(I). It was only after this deliberative process that the majority decided that child-resistant lighter inventory levels alone did not support an affirmative threat determination. *Thai Lighters* at I-22.

Importantly, it is this deliberative process that the standard of review protects because "Congress has vested the Commission with broad

discretion 'to make reasonable interpretations of the evidence and to determine the overall significance of *any particular factor* or piece of evidence.'" *Copperweld*, 12 CIT at 160, 682 F. Supp. at 564 (quoting *Maine Potato*, 9 CIT at 300, 613 F. Supp. at 1244) (emphasis added). See also, *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 52 n.18, 592 F. Supp. 1318, 1324 n.18 (1984); *Citrosuco Paulista*, 12 CIT 1196, 1225, 704 F. Supp. 1075, 1099 (1988). Thus, the Court only reviews whether there is substantial evidence on the record to support the majority's decision. See *Atlantic Sugar*, 2 Fed. Cir. (T) at 138, 744 F.2d at 1563; *Bando Chemical*, 17 CIT at 802-03.

The record demonstrates that in anticipation of the CPSC ban, most participants in the U.S. disposable lighter market stockpiled standard lighters. See *Hr'g Tr.* at 59 (testimony of Matthew T. McGrath). The record further reveals that many importers underestimated how long these stockpiles would last, and as a result, shipped too many child-resistant lighters. *Id.* at 124-25 (testimony of John Tucker). This explains why inventories of child-resistant lighters grew:

Sales of child resistant lighters, through the end of '94, were moving slow [sic] because of those inventories from all different sources of standard lighters. Standard lighters are the preferred product.

* * * * *

The market indicates because of slowness of sales of child resistant [sic] lighters, that the market is still working off those inventories of standard lighters from subject and non-subject sources.

Id. at 171 (testimony of Kenneth J. Pierce).

Thus, the record suggests that inventory levels of child-resistant lighters reflected a "miscalculation of market conditions," *id.* at 124 (testimony of John Tucker), rather than a threat to BIC. This supports the majority's decision to discount the inventories of child-resistant lighters. Thus, the Court affirms the majority's decision to discount child-resistant inventory levels because it is both reasonable and supported by the record.

III. Cumulation:

In *Chinese Lighters*, a majority of the Commission decided not to cumulate imports of Chinese disposable lighters with imports of Thai disposable lighters.⁸ *Chinese Lighters* at I-7. When addressing current injury, the majority concluded that the mandatory cumulation provision contained in 19 U.S.C. § 1677(7)(C)(iv) was not controlling because imports from Thailand were no longer subject to investigation.⁹ *Id.* at I-7 (citing *Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) 101, 109, 901

⁸ Vice Chair JANet A. Nuzman assessed the effects of the subject imports both on a cumulated and uncumulated basis before concluding that the record supports a negative determination in either framework. *Chinese Lighters* at I-17-I-20. Commissioner Newquist also decided to cumulate. *Chinese Lighters* at I-25-I-27.

⁹ Although investigations in *Thai Lighters* and *Chinese Lighters* began simultaneously, the Commission decided to stagger its final votes in *Thai Lighters* and *Chinese Lighters* because Commerce delayed its final LTFV determination for *Chinese lighters*. *Thai Lighters* at I-5 n.4. As a result, the Commission had already reached a negative determination in *Thai Lighters* when it voted in *Chinese Lighters*. *Chinese Lighters* at I-7. Thus, in *Chinese Lighters*, the majority concluded that the lighters from Thailand were no longer subject to investigation. *Id.*

F.2d 1097, 1104-05 (1990)). Likewise, when addressing threat of injury, the majority declined to exercise their discretion to cumulate for the same reason.¹⁰ *Chinese Lighters* at I-11 (citing 19 U.S.C. § 1677(7)(F)(iv)).

BIC argues that the Commission erred in both decisions. Specifically, BIC contends that the majority misapprehended the meaning of "subject to investigation" in 19 U.S.C. § 1677(7)(C)(iv), and was therefore compelled to cumulate the Thai and Chinese imports. In the alternative, BIC contends that the majority should have cumulated the imports under the discretionary "recent order exception." *Pl.'s Br.* at 81-89. The Court disagrees and addresses each argument in turn below.¹¹

A. The Majority's Interpretation of "Subject to Investigation":

By statute, the Commission is required to:

cumulatively assess the volume and effect of imports from two or more countries of like products *subject to investigation* if such imports compete with each other and with like products of the domestic industry in the United States market.

19 U.S.C. § 1677(7)(C)(iv) (emphasis added). A majority of the Commission interpreted the phrase "subject to investigation" to exclude the Thai imports because the Commission had recently found that they did not cause material injury in *Thai Lighters*. *Chinese Lighters* at I-7. Notwithstanding BIC's many challenges, the Court upholds the majority's interpretation because it accords both with controlling case law and past agency practice.

In *Chaparral*, the Federal Circuit concluded that the phrase "subject to investigation" restricts those imports that may be cumulated to those that "are definitely determined to be dumped and to contribute to *present* material injury." 8 Fed. Cir. (T) at 109, 901 F.2d at 901. It then upheld as reasonable the Commission's decision to "evaluat[e] candidates for cumulation on the basis of their unfair trading or the effects of proven unfair trading as of vote day." *Chaparral*, 8 Fed. Cir. (T) at 111, 901 F.2d at 1105.

This is precisely what the majority did here. That is, the majority assessed whether it should cumulate Thai imports with Chinese imports on vote day. *Chinese Lighters* at I-7. As noted previously, by vote day in *Chinese Lighters*, the Commission had already determined that the Thai imports did not contribute to present material injury. See *Thai Lighters*. Hence, drawing on *Chaparral*, the Commission concluded that cumulation was inappropriate. *Chinese Lighters* at I-7.

¹⁰ The majority further noted that it "would [have] reach[ed] the same result had [it] cumulated subject imports from China with lighter imports from Thailand." *Chinese Lighters* at I-11 (citations omitted).

¹¹ The Court notes that after BIC filed the petition that initiated this case, Congress amended the controlling statute through the Uruguay Round Agreements Act. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 612(a)(2)(A), 98 Stat. 2948, 3033 (1984) (formerly codified at 19 U.S.C. § 1677(C)(i) (1984)). It now provides that the Commission should cumulate imports from investigations that, although commenced simultaneously with the filing of a single petition, have become staggered. See 19 U.S.C. § 1677(7)(G)(i). Importantly, the amended statute does not govern in this case because the petition was filed before its enactment. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 612(a)(2)(A), 98 Stat. 2948, 3033.

Moreover, this conclusion is consistent with past Commission determinations. See *Certain Cased Pencils from the People's Republic of China*, USITC Pub. No. 2837, at I-12, Inv. No. 731-TA-669 (Dec. 1994) (final affirmative determination) (footnote omitted) ("[W]e have not cumulated cased pencil imports from China with imports from Thailand * * *. Imports from Thailand are no longer 'subject to investigation' as of vote day for this investigation because of the Commission's negative determination in *Certain Cased Pencils from Thailand*."; *Sulfur Dyes From India*, USITC Pub. No. 2619, at 13, Inv. No. 731-TA-550 (Apr. 1993) (final negative determination) ("Imports from China and the United Kingdom are no longer technically 'subject to investigation' because we previously reached negative final determinations with respect to those imports.") ("*Sulfur Dyes*"). The Court finds this analysis both reasonable and in accordance with law.

B. The Recent Order Exception:

Even if cumulation is not mandated by statute, the Commission still has the discretionary authority to cumulate imports under the "recent order exception," because the Commission recognizes that "imports subject to a very recent order may continue to contribute an injury to the domestic industry, and are therefore properly cumulable." *Mitsubishi Materials Corp. v. United States*, 17 CIT 301, 314, 820 F. Supp. 608, 620 (1993). According to BIC, this exception should govern in the instant case, and the Court should remand. The Court cannot agree.

BIC misapprehends the nature and the scope of the exception. First, before the Commission can invoke the recent order exception, there must be a recent antidumping or countervailing duty order. See *Sulfur Dyes* at 13 n.50; *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, USITC Pub. No. 2641, at 7-8, Inv. No. 731-TA-564 (June 1993) (final affirmative determination). Given the negative determination in *Thai Lighters*, Thai imports were not subject to a recent antidumping order.

Second, even under the recent order exception, the determination must still contain findings "that imports from the candidate for cumulation were definitely determined * * * to contribute to present material injury." *Mitsubishi Materials*, 17 CIT at 315, 820 F. Supp. at 621-22 (internal quotations omitted) (quoting *Chaparral*, 8 Fed. Cir. (T) at 109, 901 F.2d at 1104) (alteration in original). Here, imports from Thailand were determined not to contribute to present material injury. *Thai Lighters* at I-17. Hence, the Court upholds the majority's decision not to invoke the recent order exception.

CONCLUSION

The Commission's determinations regarding disposable lighters from Thailand and China are sustained because they are supported by substantial evidence and are otherwise in accordance with law.

ABSTRACTED CLASSIFICATION DECISIONS

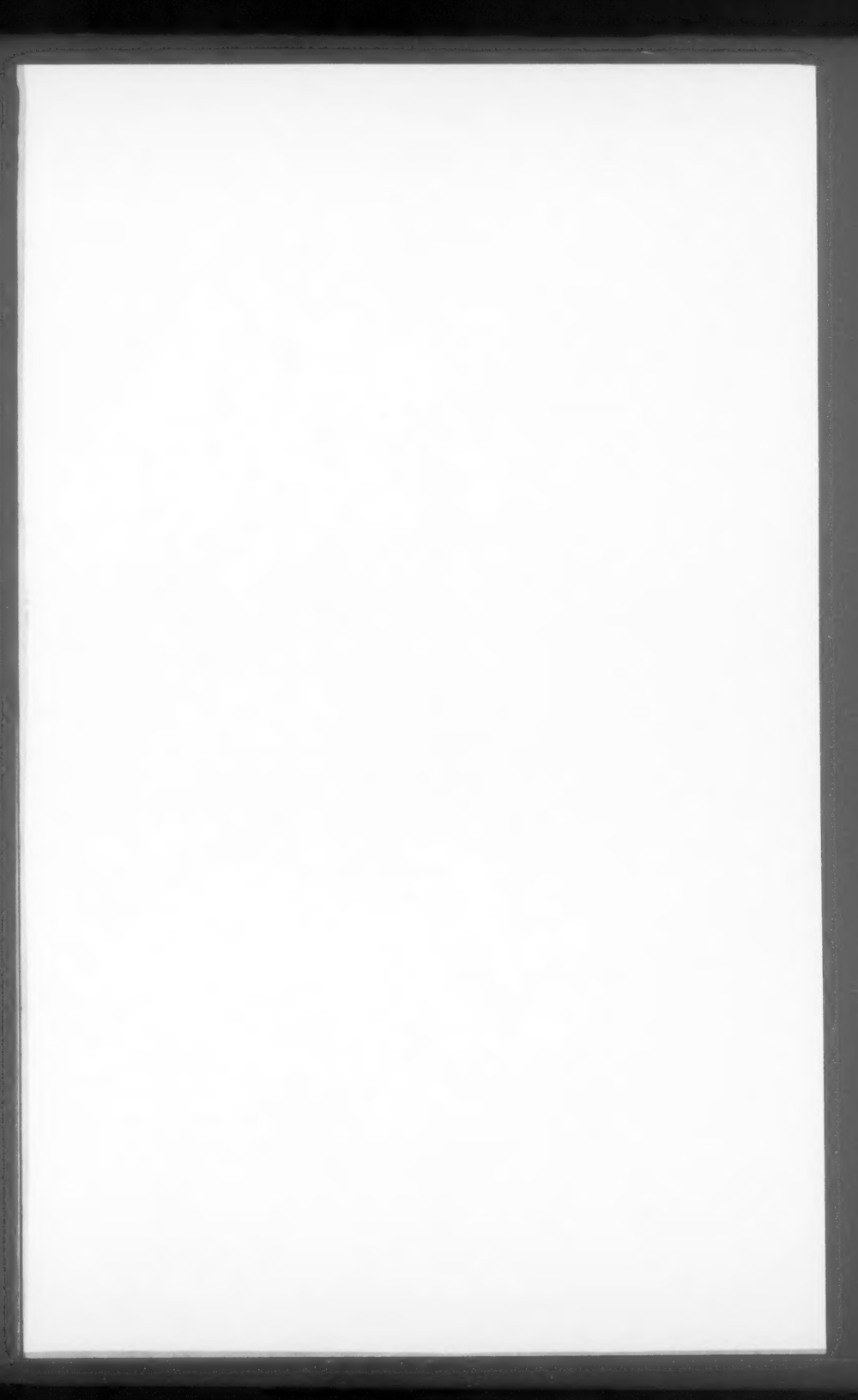
DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/52 4/18/97 Tsoucalas, J.	Algoma Steel, Corp.	96-03-00866	Various rates	7326.19.00B Duty free	Motor Wheel Corp. v. United States, Slip Op. 95-49 (March 20, 1995) Court No. 90-10-00549	Detroit Solid steel circle blanks

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V97/3 4/17/97 Goldberg, J.	Tomato, Inc.	88-03-00253	Invoiced prices, which included non-dutiable quota charges, plus in some cases, buying agents' commissions/ inspection fees	Invoiced prices less any non-dutiable quota charges included in the invoice prices, and without the addition of any non-dutiable buying agents' commissions/ inspection fees	Agreed statement of facts	Los Angeles Men's and boy's shirts or sweatshirts
V97/4 4/17/97 Goldberg, J.	Tomato, Inc.	88-05-00343	Invoiced prices, which included non-dutiable quota charges, plus in some cases, buying agents' commissions/ inspection fees	Invoiced prices less any non-dutiable quota charges included in the invoice prices, and without the addition of any non-dutiable buying agents' commissions/ inspection fees	Agreed statement of facts	Los Angeles Men's and boy's shirts or sweatshirts
V97/5 4/17/97 Goldberg, J.	Tomato, Inc.	88-12-00926	Invoiced prices, which included non-dutiable quota charges, plus in some cases, buying agents' commissions/ inspection fees	Invoiced prices less any non-dutiable quota charges included in the invoice prices, and without the addition of any non-dutiable buying agents' commissions/ inspection fees	Agreed statement of facts	Los Angeles Men's and boy's shirts or sweatshirts

ABSTRACTED VALUATION DECISIONS—Continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V97/6 4/17/97 Goldberg, J.	Tomato, Inc.	89-06-00321	Invoiced prices, which included non-dutiable quota charges, plus in some cases, buying agents' commissions/ inspection fees	Invoiced prices less any non-dutiable quota charges included in the invoice prices, and without the addition of any non-dutiable buying agents' commissions/ inspection fees	Agreed statement of facts	Los Angeles Men's and boy's shirts or sweatshirts
V97/7 4/18/97 Goldberg, J.	Tomato, Inc.	89-12-00665	Invoiced prices, which included non-dutiable quota charges, plus in some cases, buying agents' commissions/ inspection fees	Invoiced prices less any non-dutiable quota charges included in the invoice prices, and without the addition of any non-dutiable buying agents' commissions/ inspection fees	Agreed statement of facts	Los Angeles Men's and boy's shirts or sweatshirts





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